



205289

UNITED STATES OF AMERICA, Plaintiff, v. AKZO NOBEL A.B.,
AMERICAN CYANAMID COMPANY, BISSELL, INC., E.I. DUPONT DE
NEMOURS AND COMPANY, DOW AGROSCIENCES LLC, ELI LILLY &
COMPANY, GENERAL ELECTRIC COMPANY, IBM CORPORATION, LOMAC,
INC., MALLINCKRODT INC., MONSANTO COMPANY, SHELL OIL
COMPANY, SMITHKLINE BEECHAM CORPORATION, and UNION CARBIDE
CORPORATION, Defendants

Case No. 1:99-CV-731

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

1999 EPA Consent LEXIS 204

September 22, 1999

COUNSEL: [*1] FOR THE UNITED STATES OF AMERICA: Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C.; W. Benjamin Fisherow, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C.; Michael Dettmer, United States Attorney, Western District of Michigan; W. Francesca Ferguson, Assistant United States Attorney, Western District of Michigan, U.S. Department of Justice, Grand Rapids, Michigan; Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, Washington, D.C.; Douglas P. Dixon, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, Washington, D.C.; William E. Mung, Director, Superfund Division, U.S. Environmental Protection Agency, Chicago, Illinois; Thomas Krueger, Larry L. Johnson, Assistant Regional Counsel, U.S. Environmental Protection Agency, Chicago, Illinois

FOR Eli Lilly and Company *: Rebecca O. Goss, Senior Vice President/General Counsel, Lilly Corporate Center, Indianapolis, Indiana

* A separate signature page must be signed by each corporation, individual or other legal entity that is settling with the United States. [*2]

FOR MONSANTO COMPANY *: Thomas M. Bistline, Assistant General Counsel Litigation, St. Louis MO

* A separate signature page must be signed by each corporation, individual or other legal entity that is settling with the United States.

FOR GENERAL ELECTRIC COMPANY *: Andrew S. Hogeland, Counsel - Environmental Health and Safety Programs, GE Plastics, Pittsfield, MA

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FOR Dow AgroSciences LLC *: CT Corporation System, Principal Office, Indianapolis, IN

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FOR Lomac, Inc. *: Marvin R. Gallisdorfer, President, Lomac, Inc., Cincinnati, Ohio

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For UNION CARBIDE CORPORATION *: C. L. Dudnick, Chief Environmental Counsel, Union Carbide Corporation, Law Department, Danbury, Connecticut

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FOR E. I. DU PONT DE NEMOURS AND COMPANY *: Barbara U. Gravely, Corporate Legal Assistant, DuPont Legal, Wilmington, DE

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FOR BISSELL Inc. *: Daniel T. Caldon, Senior Vice President-Administration, Grand Rapids, MI

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For International Business Machines Corporation: CT Corporation System

FOR American Cyanamid COMPANY, INC. *: Margaret R. Tribble, Corporate Counsel-American Home Products Corporation, Parsippany, NJ

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FOR SMITHKLINE BEECHAM CORPORATION *: Paul R. Noll, Senior Counsel, SmithKline Beecham Corporation, Philadelphia, PA

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FOR Shell Oil COMPANY, INC. *: G. A. Thompson, Remediation Manager, Houston, TX

* A separate signature page must be signed by each corporation, individual or other legal entity that is settling with the United States. [*4]

FOR Mallinckrodt Inc. *: Roger A. Keller, Vice President, Secretary & General Counsel, St. Louis, MO.

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FOR Akzo Nobel AB *: Lois Kimbol, Esquire, Counsel, Dechert Price & Rhoads, Philadelphia, PA

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OPINION:

CONSENT DECREE

I. BACKGROUND

The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the

Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607.

A. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred and to be incurred by EPA and the Department of Justice for response actions at the Bofors Nobel, Inc. Superfund Site ("the Site") in Muskegon, Michigan, together with accrued interest; and (2) performance of studies and response work by the defendants at the Site [*5] consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

B. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Michigan (the "State") on May 31, 1997 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

C. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the U.S. Department of the Interior, the Michigan Department of Environmental Quality ("MDEQ") and the Michigan Attorney General on May 31, 1997 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal and State trusteeship and encouraged the trustees to participate in the negotiation of this Consent Decree. The natural resources trustees, as designated by CERCLA, elected to participate in the negotiations as reflected herein and in the separate settlement between the Settling Defendants [*6] and the State.

D. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor do they acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

Site Background

E. Lakeway Chemicals Inc. ("LCI") began producing chemicals at the Site in 1960. Throughout the 1960s and early 1970s, ten on-site lagoons were used for disposal of sludge, wastewater, and various liquids. Beginning in 1976, liquid process wastes generated by LCI were sent to a local sewage treatment plant for disposal.

In 1977, LCI merged with Bofors Industries, Inc., which was a wholly owned subsidiary of Bofors America, Inc. ("BAI"). The merged company was called Bofors Lakeway Inc. ("BLI"). Five months after the merger, the State of Michigan sued BLI to require cleanup of the lagoons, the surrounding soil, the groundwater and the adjacent creek. A consent judgment was signed in 1981 by the State and BLI, pursuant to which a groundwater extraction [*7] and treatment system was installed to contain the migration of the plume of contaminated groundwater. A.B. Bofors, the Swedish parent of BAI, provided a guarantee of \$2 million for the long term operation and maintenance of the remedy.

In December 1985, BLI, which at that time was known as Bofors Nobel Inc. ("BNI"), filed a chapter 11 petition in bankruptcy for reasons including reported environmental obligations in excess of \$60 million. The operating plant area of the Site ("Operating Plant Area") and other assets were sold out of bankruptcy to Lomac, Inc. in 1987. The proceeds of the sale of BNI's assets were paid to the United States (\$5 million) and Michigan (\$10 million). In addition, in 1987, A.B. Bofors, known at that time as Nobel Industries A.B., paid \$2,000,000 to the State under the 1981 guarantee. The State used the \$12 million for Site response actions including remedial investigation and groundwater extraction and treatment. The \$5 million paid to the United States and held in a special account pursuant to CERCLA Section 122(b)(3), 42 U.S.C. § 9622(b)(3), has, with interest, grown to approximately \$8.4 million, and will be used for the Work and reimbursement [*8] of costs as described in this Consent Decree. Akzo Nobel A.B., the successor to Nobel Industries A.B., is a Swedish corporation.

Lomac, Inc., was formed in 1987 for the express purpose of acquiring the Operating Plant Area from the BNI estate. The sale was approved by the Order of the Bankruptcy Court in the Western District of Michigan. Lomac's purchase of the Operating Plant Area in 1987 was expressly conditioned upon the agreement by the State of

Michigan and the United States granting Lomac a covenant not to sue for liability for any contamination existing at the Site as of March 25, 1987. Specifically, the State of Michigan, the United States and Lomac entered into an "Agreement and Covenant Not to Sue" dated March 25, 1987, and the State and Lomac executed a Modified Consent Agreement dated March 30, 1987. The sale to Lomac was intended by EPA and the State to expedite the remedy at the Site by providing maximum funding for the implementation of remedial action. Lomac was alleged to be a potentially responsible party at the Site following a 1990 report by Lomac of a release of certain contaminants at the Operating Plant Area. Lomac has occupied the Operating Plant Area from [*9] the time of its purchase to the date of this Consent Decree, producing various chemicals, including 3,3'-dichlorobenzidine ("DCB") and Oryzalin.

F. Settling Defendants American Cyanamid Company; Bissell, Inc.; Continental Oil Company; DowElanco; Eli Lilly & Company; General Electric Company; IBM Corporation; Mallinckrodt Specialty Chemicals; Monsanto Chemical Intermediates Co.; Shell Oil Company; SmithKline Beecham Corp.; and Union Carbide Corporation entered into arrangements for manufacture of chemicals at the Site and are alleged by the United States to be potentially responsible parties under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

Response Activities at the Site to Date

G. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on March 31, 1989, 54 Fed. Reg. 13296.

H. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, the MDEQ (formerly known as the Michigan Department of Natural Resources) commenced, in March 1987, a Remedial Investigation and Feasibility Study ("RI/FS") for the [*10] Site pursuant to 40 C.F.R. § 300.430.

I. Response actions at the Site were divided into two operable units. The First Operable Unit addresses all Site groundwater and the general area where lagoons were used for disposal of hazardous substances. The Second Operable Unit ("OU2") addresses contaminant source areas in the Operating Plant Area which is now owned and operated by Lomac, Inc. This Consent Decree and the First Operable Unit ("OU1") Record of Decision as amended, and the State of Michigan Site Consent Decree ("State Agreement") and associated Interim Remedial Action Plan for the Operating Plant Area ("IRAP"), attached hereto as Appendices, cover an integrated remedial action which will address the existing contamination at the Site. Pursuant to the State Agreement, Lomac will perform the IRAP. EPA will issue a final ROD for OU2.

J. MDEQ completed a Remedial Investigation ("RI") Report for the Site in February, 1990, and Feasibility Study ("FS") Reports for OU1 and OU2 in May, 1990 and November, 1991, respectively.

K. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action for the First [*11] Operable Unit on July 21, 1990, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

L. EPA subsequently proposed to amend the proposed remedial action for Operable Unit One on two separate occasions. The Second Amended OU1 ROD also finalized Site-wide groundwater standards. Notices of the proposed revisions to the remedial action decision were published in a major local newspaper of general circulation on April 6, 1992 and June 17, 1998. EPA provided an opportunity for written and oral comments from the public on the proposed revisions to the remedial action. Copies of the transcripts of the public meetings are available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

M. The decision by EPA on the remedial action to be implemented for the First Operable Unit at the Site is embodied in: (1) an original [*12] Record of Decision, executed on September 17, 1990, on which the State has

given its concurrence; and (2) the amendments to the original Record of Decision which were executed on July 22, 1992, and ___, 1998, on which the State has given its concurrence, which are attached hereto as Appendix A. The decision by EPA on the final remedial action alternatives to be considered for implementation for the Second Operable Unit at the Site is embodied in its concurrence with the IRAP and is attached hereto as Appendix B. The Performance of the IRAP will be conducted pursuant to the State Agreement, attached hereto as Appendix C. The Original OU1 Record of Decision and all subsequent amendments (collectively, the "OU1 ROD") include responsiveness summaries to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA. The final standards for lagoon and groundwater remedial actions are addressed by the Second Amended OU1 ROD. Interim response actions necessary to prevent exposure to existing hazardous substances at the Operating Plant Area are addressed in the IRAP to be implemented pursuant to the State Consent Decree. Final Site remedial actions [*13] needed to address any remaining contamination will be addressed by a final OU2 Record of Decision to be issued by EPA. All final site remedial actions will be consistent with the OU1 and IRAP remedial actions and will be funded in whole or in part by the OU2 Special Account established pursuant to this Agreement.

N. Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly conducted by the Performing Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

O. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

P. The Parties recognize, and the Court by entering this Consent Decree finds, that extraordinary circumstances exist regarding Akzo Nobel A.B.'s participation in and payment under this Consent Decree, as well as past payments, that justify providing [*14] Akzo Nobel with the relief provided in this Consent Decree, and that, taken together, the terms, conditions and requirements of this Consent Decree are in the public interest and are sufficient to provide all reasonable assurances that the public health and the environment will be protected from any future releases at the Site.

Q. The Parties recognize, and the Court by entering this Consent Decree finds, that settlement with the De Minimis Settling Defendants involves a minor portion of the response costs at the Site. Information currently available to the United States indicates: (1) that the amount of hazardous substances contributed to the Site by each De Minimis Settling Defendant is minimal in comparison to the total amount of hazardous substances contributed to the Site, since the contribution by each was less than 1% of the total; and (2) that the toxic or other hazardous effects of the hazardous substances contributed to the Site by each De Minimis Settling Defendant is minimal in comparison to the toxic or other hazardous effects of the other hazardous substances at the Site and did not and do not contribute disproportionately to the cumulative toxic or other hazardous effects [*15] of the hazardous substances at the Site.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants, to the extent of the waiver described herein. Solely for the purposes of this Consent Decree and the underlying Complaint (but solely for purposes of lodging, entry, implementation, and enforcement of this Consent Decree), and without effect on any other matter, including any related action, the Settling Defendants waive all objections and defenses that they may have to jurisdiction or to venue in this District and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. Whether or not this Consent Decree is entered by this Court, Akzo Nobel A.B.'s participation in the process of negotiating, lodging, approval, entry, and performance of this Consent Decree and the waivers of objections and defenses which it has to jurisdiction of this

Court over it, and to venue in this District [*16] for the purposes of this Consent Decree, shall not be admissible, and the Parties agree they shall not use such participation or waivers, in any judicial or administrative proceeding in this matter or any other for any purpose, including without limitation, as evidence of personal jurisdiction. If this Consent Decree is not entered, this consent of Akzo Nobel A.B. to jurisdiction and venue is void and to no effect, as if never granted. Notwithstanding that Akzo Nobel A.B. is waiving its defenses to jurisdiction solely for the purpose of approval and entry of this Consent Decree, Akzo Nobel A.B. believes that there would be no personal jurisdiction over it in the United States because it has no operations or assets here. Performing Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall [*17] in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Performing Settling Defendants shall provide a copy of this Consent Decree to the Project Manager and Supervising Contractor hired to perform the Work (as defined below) required by this Consent Decree and to the person representing each Performing Settling Defendant as designated on the signature pages of this Agreement with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Performing Settling Defendants or the Supervising Contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Performing Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Performing Settling Defendants within [*18] the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"Akzo Nobel" shall mean Akzo Nobel A.B. and Akzo Nobel N.V., their direct and indirect wholly owned subsidiaries, and the officers, directors, parents, predecessors, and successors of each insofar as the sole basis for liability for each at the Site is asserted involvement in, ownership or control over Bofors Lakeway, Inc. or Bofors Nobel, Inc. or their operations or property from and after the time of the merger of Bofors Industries, Inc. with Lakeway Chemicals, Inc. in 1977.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

"Consent Decree" or "this Agreement" shall mean this Decree and all appendices attached hereto [*19] (listed in Section XXXIII). In the event of conflict between this Decree and any appendix, this Decree shall control.

"Contingent Remedial Actions" shall mean those activities to be undertaken by the Performing Settling Defendants in the event certain Performance Standards are not met or other triggering events occur, as defined in the Second Amended OU1 ROD, the SOW and the approved Contingent Remedial Action Plan.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

"De Minimis Settling Defendants" shall mean those parties listed in Appendix D, Section II.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"Final Settlement Fund" shall mean the trust fund to be established and used as described in Paragraphs 50, 58 and 59 of this Consent Decree.

"Future Response Costs" shall mean all costs paid [*20] after the entry of this Consent Decree, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, costs incurred by the State and paid by EPA pursuant to any written agreement with EPA, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, attorneys fees and any monies paid to secure access and/or to secure or implement Institutional Controls, including, but not limited to, the amount of just compensation), XV, and Paragraph 89 of Section XXV. Provided, however, that any Site studies or evaluations undertaken by or solely at the request of the EPA Superfund Innovative Technology Evaluation Program will not be included as Future Response Costs and that any costs of operating and maintaining the existing groundwater treatment plant prior to and through November 1, 1999, which are included as Past Response Costs will not be included as Future Response Costs. [*21]

"Initial Settlement Fund" shall mean the trust account to be established and used as described in Paragraphs 50-52 of this Consent Decree.

"Institutional Controls" shall mean land and/or water use restrictions including, but not limited to, restrictions in the form of contractual agreements, restrictive easements/covenants that run with the land, and governmental controls.

"Interim Remedial Action Plan" or "IRAP" shall mean those response actions to be performed pursuant to the State Agreement, Appendix C hereto, which actions will be consistent with the Work performed pursuant to this Agreement.

"Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

"Lagoon Area" shall mean that portion of the Site where lagoons were used for disposal of sludge, wastewater, and various liquids and areas where contamination from those lagoons has come to be located, as generally depicted in Appendix E.

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances [*22] Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Natural Resources" shall include land, fish, wildlife, biota, air, water, groundwater, drinking water supplies and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States or the State of Michigan.

"Natural Resource Damages" shall mean damages for injuries to, destruction of, or loss of Natural Resources at the Bofors Nobel, Inc. Site that occurred prior to the effective date of this Consent Decree, including the costs of assessing the injury, destruction, or loss. Notwithstanding this definition, nothing in this Consent Decree shall be construed to broaden any covenant not to sue granted by the State in the State Consent Decree.

"1987 Lomac Agreements" shall mean the "Agreement and Covenant Not to Sue" executed by Lomac, the State

and the United States, dated March 25, 1987; and the Modified Consent Agreement executed by Lomac and the State, dated March 30, 1987.

"O & M Trust Fund" shall mean the trust account to be established and used as described in Paragraph [*23] 50 of this Consent Decree.

"Operable Unit 1" or "OU1" shall mean the portion of the Site remedy addressing contamination in the sludge and soils in, under and around the lagoon areas (as generally depicted in Appendix E), and the extraction and treatment of contamination in groundwater.

"Operable Unit 1 ROD" or "OU1 ROD" shall mean, collectively, the original Record of Decision for Operable Unit 1, executed on September 17, 1990, and the amendments to the original Record of Decision for Operable Unit 1 which were executed on July 22, 1992, and ___, 1998, which are attached hereto as Appendix A.

"Operable Unit 1 Special Account" or "OU1 Special Account" shall mean the \$5 million paid to the United States by the bankruptcy estate of Bofors Nobel, Inc., together with any interest accrued thereon. The approximate value of the OU1 Special Account as of February 6, 1998 is \$8,423,316.73. The OU1 Special Account is set aside within the Hazardous Substances Superfund pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3) specifically for use at the Bofors Nobel, Inc. Superfund Site.

"Operable Unit 2" or "OU2" shall mean that portion of the Site remedy addressing contaminated soils [*24] at the Operating Plant Area located at 5025 Evanston Avenue, Muskegon, Michigan, which is now owned and operated by Lomac and which is generally depicted in Appendix E.

"Operable Unit 2 Special Account" or "OU2 Special Account" shall mean that interest bearing account established to receive and hold \$2,000,000 in settlement funds pursuant to this Agreement until such funds are needed for use by EPA in implementing the final Site OU2 remedial actions or to reimburse EPA for unreimbursed Past Response Costs if not needed for final Site remedial actions or to pay other appropriate response costs.

"Operating Plant Area" shall mean the property located at 5025 Evanston Avenue, Muskegon, Michigan, which is currently owned by Lomac, Inc. and which is generally depicted in Appendix E.

"Operation and Maintenance" or "O & M" shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (SOW).

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" shall mean the [*25] United States and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurred and paid at or in connection with the Site through the date of entry of this Consent Decree, and also includes the costs incurred and paid by EPA and the State to fund the operation of the existing groundwater treatment plant through November 1, 1999, plus Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such dates.

"PDD" shall mean the Preauthorization Decision Document issued by EPA on ___, 1998, authorizing mixed funding reimbursement to the Performing Settling Defendants pursuant to Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2), and attached hereto as Appendix F.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the Remedial Action Objectives, including the Applicable or Relevant and Appropriate Requirements ("ARARs"), defined in Section ___ of the Second Amended OU1 ROD and Section II of the SOW.

"Performing Settling Defendants" shall mean those Parties listed in Appendix D, Section I, which shall be

responsible for implementation [*26] of the remedial actions pursuant to this Agreement.

"Plaintiff" shall mean the United States.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

"Remedial Action" shall mean those activities (including Contingent Remedial Actions), except for Operation and Maintenance, to be undertaken by the Performing Settling Defendants to implement the OU1 ROD, in accordance with the SOW and the final Remedial Design and Remedial Action Work Plans and other plans approved by EPA.

"Remedial Action Work Plan" shall mean the document developed pursuant to Paragraph 11 of this Consent Decree and approved by EPA, and any amendments thereto.

"Remedial Action Objectives" shall mean:

1. A. Containment of lagoon sludge and soils to prevent on-site exposure to hazardous substances at concentrations that pose an unacceptable risk to human receptors under industrial land use scenarios via the following routes of exposure: (a) direct contact, (b) inhalation from volatilization to indoor air, (c) inhalation from volatilization to ambient air, (d) drinking water use of aquifer, (e) groundwater contact, and (f) [*27] surface water contact.

B. Containment of lagoon sludge and soils to prevent on-site exposure to hazardous substances at concentrations that pose an unacceptable risk to environmental receptors via the following routes of exposure and migration pathways: (a) contact with contaminants present in surface soils, plants, water or air on-site, (b) groundwater impacts on surface water, and (c) soil runoff impacts on surface water;

2. Containment of lagoon sludge and soils to prevent off-site migration of contaminants to air, soil or groundwater at concentrations that would pose an unacceptable risk to human and/or environmental receptors; and

3. Containment of groundwater to prevent migration of contaminants at concentrations that would pose an unacceptable risk to human and/or environmental receptors off-site including to Big Black Creek and to the on-site wetlands between Big Black Creek and the barrier wall.

"Remedial Design" shall mean those activities to be undertaken by the Performing Settling Defendants to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

"Remedial Design Work Plan" shall mean the document developed pursuant [*28] to Paragraph 10 of this Consent Decree and approved by EPA, and any amendments thereto.

"Second Amended OU1 Record of Decision" or "Second Amended OU1 ROD" shall mean the document issued by EPA on ___, 1998 and attached as Appendix A.

"Section" shall mean a portion of this Consent Decree identified by a capital roman numeral.

"Settling Defendants" shall mean those Parties identified in Appendix D.

"Site" shall mean the Bofors Nobel, Inc. Superfund Site, encompassing approximately 85 acres, located at 5025 Evanston Avenue, Muskegon, Michigan, and other areas where releases from the Site have come to be located. The Site is depicted generally on the maps attached as Appendix E.

"Site Management Transition Plan" shall mean a plan describing the tasks to be accomplished by the Performing Settling Defendants during the Remedial Design and Remedial action construction, including, but not limited to, operation of groundwater extraction systems and the existing groundwater treatment plant. The United States and the State own the groundwater extraction systems and groundwater treatment plant located and presently operating

at the Site, although the Performing Settling Defendants are to be [*29] responsible for all operation and maintenance of the groundwater extraction system and groundwater treatment plant required by this Consent Decree.

"State" shall mean the State of Michigan, the Michigan Department of Environmental Quality (successor to the Michigan Department of Natural Resources as the State agency responsible for participation in remediation of the Site), and any other departments or agencies of the State and authorized representative acting on their behalf.

"State Consent Decree" or "State Agreement" shall mean that agreement entered into by the Settling Defendants and the State, which is attached hereto as Appendix C.

"Statement of Work" or "SOW" shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance at the Site, as set forth in Appendix G to this Consent Decree and any modifications made in accordance with this Consent Decree.

"Superfund" shall mean, with respect to payments made under this Consent Decree, the Hazardous Substance Superfund established by 26 U.S.C. § 9507.

"Supervising Contractor" shall mean the principal contractor retained by the Performing Settling Defendants to supervise and [*30] direct the implementation of the Work under this Consent Decree.

"United States" shall mean the United States of America.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous substance" under Part 201 of the Michigan Natural Resources and Environmental Protection Act, 1994 PA 451, excepting any waste materials or hazardous substances resulting from or associated with the operations of Lomac, Inc. after the effective date of this Consent Decree.

"Work" shall mean all activities Performing Settling Defendants are required to perform under this Consent Decree, except those required by Section XXIX (Retention of Records).

V. GENERAL PROVISIONS

5. Objectives of the Parties

The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Performing Settling Defendants, to reimburse response costs of the [*31] Plaintiff, to resolve the claims of Plaintiff against Settling Defendants as provided in this Consent Decree, and to resolve specified claims of the Settling Defendants against each other.

6. Commitments by Settling Defendants

a. Settling Defendants shall reimburse the United States pursuant to this Agreement for a portion of unrecovered Site Past Response Costs, and for Future Response Costs and OU2 Final Site Settlement costs. Settling Defendants shall also make payments to the State trustee under the State Agreement to resolve Site Natural Resource Damages claims. Performing Settling Defendants shall finance and perform the Work in accordance with this Consent Decree, the OU1 ROD, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Performing Settling Defendants and approved by EPA pursuant to this Consent Decree.

b. The obligations of Performing Settling Defendants to finance and perform the Work and to pay amounts owed the United States under this Consent Decree are joint and several. In the event of the insolvency or other failure of

any one or more Performing Settling Defendants to implement the requirements [*32] of this Consent Decree, the remaining Performing Settling Defendants shall complete all such requirements.

c. The obligations of Settling Defendant Akzo Nobel A.B. and the De Minimis Settling Defendants to pay the amounts specified pursuant to this Agreement and in Appendix D are individual.

7. Compliance With Applicable Law

All activities undertaken by Performing Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws, and regulations. Performing Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the OUI ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion [*33] of the Work that is not on-site requires a federal or state permit or approval, Performing Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Performing Settling Defendants may seek relief under the provisions of Section XXII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

VI. PERFORMANCE OF THE WORK BY PERFORMING SETTLING DEFENDANTS

9. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Performing Settling Defendants pursuant to Sections VI (Performance of the Work by Performing Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA, after a reasonable [*34] opportunity for review and comment by the State. Within 90 days after the lodging of this Consent Decree, Performing Settling Defendants shall notify EPA and the State in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Performing Settling Defendants propose to change a Supervising Contractor, Performing Settling Defendants shall give such notice to EPA and the State and must obtain an authorization to proceed from EPA, after a reasonable opportunity for review and comment by the State, before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree. The proposed Supervising Contractor will be considered approved unless rejected by EPA within 30 days of submission. In the event of a sudden and unexpected withdrawal of the Supervising Contractor, the Performing Settling Defendants may continue work as necessary until a replacement Supervising Contractor is selected and approved.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Performing Settling Defendants in writing. [*35] Performing Settling Defendants shall submit to EPA and the State a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Performing Settling Defendants may select any contractor from that list that is not disapproved and shall notify EPA and the State of the name of the contractor selected within 21 days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Performing Settling Defendants from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Performing Settling Defendants may seek relief under the provisions of Section XXII (Force Majeure) hereof.

10. Site Management Transition Plan and Remedial Design.

a. Within 60 days of entry of the Consent Decree, the Performing Settling Defendants shall submit to EPA and the [*36] State a work plan containing a detailed description of tasks to be performed and schedule for the management of OU1 during the Remedial Design and the Remedial Action, as described in the SOW, including assumption of operation of the existing groundwater extraction system and groundwater treatment plant. Any contracts or subcontracts that the Performing Settling Defendants enter into or arrange for the operation of the existing groundwater extraction system and groundwater treatment plant shall require approval by EPA. Within 180 days after entry of this Consent Decree or the effective date of Pre-Authorization Decision Document, whichever is later, Performing Settling Defendants shall submit to EPA and the State a work plan for the design of the Remedial Action for the OU1 at the Site ("Remedial Design Work Plan" or "RD Work Plan"). The Remedial Design Work Plan shall provide for design of the remedy set forth in the OU1 ROD, in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the OU1 ROD, this Consent Decree and/or the SOW. Upon its approval by EPA, the Remedial Design Work Plan shall be incorporated into and become enforceable [*37] under this Consent Decree. Within 60 days after EPA's issuance of an authorization to proceed, the Performing Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field design activities which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in Section III.D through H of the SOW.

c. Upon approval of the Remedial Design Work Plan by EPA, after a reasonable opportunity for review and comment by the State, and submittal of the Health and Safety Plan for all field activities to EPA and the State, Performing Settling Defendants shall implement the Remedial Design Work Plan. The Performing Settling Defendants shall submit to EPA and the State all plans, submittals and other deliverables required under the approved Remedial Design Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Performing Settling [*38] Defendants shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.

d. The preliminary design submittal and the draft final/final design submittals shall be as specified in the SOW.

11. Remedial Action.

a. Performing Settling Defendants shall submit to EPA and the State, a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan") in accordance with the schedules in the SOW and the approved Remedial Design Work Plan. The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the OU1 ROD and achievement of the Performance Standards, in accordance with this Consent Decree, the OU1 ROD, the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan and approved by EPA. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Consent Decree. At the same time as they submit the Remedial Action Work Plan, Performing Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field activities required by the Remedial [*39] Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Action Work Plan shall include plans and schedules for implementation of all remedial action tasks identified in Section III of the SOW. The Remedial Action Work Plan also shall include a schedule for

implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Performing Settling Defendants' Remedial Action Project Team (including, but not limited to, the Supervising Contractor).

c. Upon approval of the Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by the State, Performing Settling Defendants shall implement the activities required under the Remedial Action Work Plan. The Performing Settling Defendants shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed [*40] in writing by EPA, Performing Settling Defendants shall not commence physical Remedial Action activities at the Site prior to approval of the relevant portion of the Remedial Action Work Plan.

12. The Performing Settling Defendants shall continue to implement the Remedial Action and O&M until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Consent Decree.

13. Modification of the SOW or Related Work Plans.

a. If EPA determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the Second Amended OU1 ROD, EPA may require that such modification be incorporated in the SOW and/or such work plans. Provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the Second Amended OU1 ROD.

b. For the purposes of this Paragraph 13 and Paragraphs 46 and 47 only, the "scope of the remedy selected in the OU1 ROD" is to achieve and maintain compliance with [*41] the Remedial Action Objectives.

c. If Performing Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XXIII (Dispute Resolution), Paragraph 71 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Performing Settling Defendants shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

14. Performing Settling Defendants acknowledge and agree that nothing in this Consent Decree, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by the Plaintiff that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

15. Performing Settling Defendants shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project [*42] Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

a. The Performing Settling Defendants shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material are to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Performing Settling Defendants shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Performing Settling Defendants

following the award of the contract for Remedial Action construction. The Performing Settling Defendants shall provide the information required by Paragraph 15.a as soon as practicable after the award of the contract and before the Waste [*43] Material is actually shipped.

VII. REMEDY REVIEW

16. Periodic Review. Performing Settling Defendants shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the Remedial Action is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations. If feasible, EPA will attempt to coordinate the review required by Paragraphs 57.b.ii and 59 with the review required by Section 121(c) of CERCLA.

17. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Actions, including Contingent Remedial Actions, are not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP. Nothing in this Consent Decree shall be construed, however, to create an obligation on the part of Settling Defendants to perform such further response actions. No Party waives any rights or defenses it may have pursuant CERCLA or the NCP except as otherwise set forth in this Consent Decree.

18. Opportunity To Comment. Settling Defendants [*44] and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

19. Performing Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with "EPA Requirements for Quality Assurance Project Plans for Environmental Data Operation," (EPA QA/R5; "Preparing Perfect Project Plans," (EPA /600/9-88/087), and subsequent amendments to such guidelines upon notification by EPA to Performing Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Performing Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") that is consistent [*45] with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Performing Settling Defendants shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Performing Settling Defendants in implementing this Consent Decree. In addition, Performing Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Performing Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of [*46] the implementation of this Decree. Performing Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Performing Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

20. Upon request, the Performing Settling Defendants shall allow split or duplicate samples to be taken by EPA and the State or their authorized representatives. Performing Settling Defendants shall notify EPA and the State not less than 10 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA and the State shall have the right to take any additional samples that EPA or the State deem necessary. Upon

request, EPA and the State shall allow the Performing Settling Defendants to take split or duplicate samples of any samples they take as part of the oversight of the Performing Settling Defendants' implementation of the Work.

21. Performing Settling Defendants shall submit [*47] to EPA and the State two copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Performing Settling Defendants with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

22. Notwithstanding any provision of this Consent Decree, the United States and the State hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

IX. ACCESS AND INSTITUTIONAL CONTROLS

23. a. Following the entry of this Consent Decree, if the Site, or any other property for which EPA determines that access is required to implement this Consent Decree, the SOW or the remedy selected in the OUI ROD, is owned or controlled by persons other than the State or EPA, Performing Settling Defendants shall use their best efforts to secure access for Performing Settling Defendants, as well as for EPA and the State and their representatives (including contractors), for the purpose of conducting any activity pursuant to this Consent Decree including, but not limited to, the following [*48] activities:

- i. Monitoring the Work;
- ii. Verifying any data or information submitted to the United States or the State;
- iii. Conducting investigations relating to contamination at or near the Site;
- iv. Obtaining samples;
- v. Assessing the need for, planning, or implementing additional response actions at or near the Site;
- vi. Implementing the Work pursuant to the conditions set forth in Paragraph 89 of this Consent Decree.
- vii. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Performing Settling Defendants or their agents, consistent with Section XXVIII (Access to Information);
- viii. Assessing Performing Settling Defendants' compliance with this Consent Decree; and
- ix. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, by paragraph 24 of this Consent Decree or the Institutional Controls established pursuant to this Consent Decree.

b. If EPA so requests, Performing Settling Defendants shall use best efforts to secure the recordation in the Recorder's Office of Muskegon County, State of Michigan, of access easements that grant a right of access to the property, running with the [*49] land, for the purpose of conducting any activity related to this Consent Decree, including, but not limited to, those activities listed in Subparagraph a of this Paragraph, to one or more of the following persons or entities, as directed by EPA:

- i. EPA and its representatives,
- ii. the State and its representatives,
- iii. the Performing Settling Defendants and their representatives, or
- iv. other appropriate grantees, If such access easements are requested, Performing Settling Defendants shall proceed in accordance with the requirements of Subparagraph a of this Paragraph.

c. For purposes of this Paragraph "best efforts" includes the payment of reasonable sums of money in consideration of access and/or access easements. If any access required by Subparagraph a of this Paragraph is not obtained within 45 days of the date of entry of this Consent Decree, or within 45 days of the date EPA notifies the Performing Settling Defendants in writing that additional access beyond that previously secured is necessary, or if any access easements requested by EPA under Subparagraph b of this Paragraph are not recorded within 45 days of a request by EPA for such easements, Performing Settling Defendants [*50] shall promptly notify the United States in writing, and shall include in that notification a summary of the steps (including requests, offers, and responses thereto) that Performing Settling Defendants have taken to attempt to obtain access or access easements. The United States may, as it deems appropriate, assist Performing Settling Defendants in obtaining access or access easements. Performing Settling Defendants shall reimburse the United States, in accordance with the procedures in Section XVII (Reimbursement of Response Costs), for all costs incurred by the United States in obtaining access or access easements.

24. a. Commencing upon the date of entry of this Consent Decree, the Performing Settling Defendants shall use their best efforts to secure all necessary commitment from property owners to refrain from using any property affected by or affecting the remedy selected in the OU1 ROD in any manner, or engaging in any other activities, that could interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree including, but not limited to, the following land and/or water use restrictions: that there [*51] shall be no use of the property that may interfere with the Work to be performed under this Consent Decree; that there shall be no residential, agricultural or commercial use of the property except for such uses which already exist or such commercial or industrial uses which are consistent with existing uses; that no excavation, construction or drilling or any other activity that may damage any remedial action component shall take place at the property; that ground water wells for drinking water or domestic purposes shall not be used or installed at the property; that there shall be no use of the property that would allow the continuous presence of humans at the property except for such uses which already exist or such commercial or industrial uses which are consistent with existing uses; that no Waste Material from off-site shall be transported to the Lagoon Area.

b. If EPA so requests, Performing Settling Defendants shall use best efforts to secure recordation in the Recorder's Office of Muskegon County, State of Michigan, of restrictive easements/covenants, running with the land, that impose the obligations and restrictions established in Subparagraph a. of this Paragraph, or that [*52] are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. The restrictive easements/covenants shall be granted to one or more of the following persons or entities, as directed by EPA:

- i. the United States, on behalf of EPA and its representatives,
- ii. the State and its representatives,
- iii. the Performing Settling Defendants and their representatives, or
- iv. other appropriate grantees,

If such restrictive easements/covenants are requested, Performing Settling Defendants shall proceed in accordance with the requirements of Subparagraph a of this Paragraph.

c. For purposes of this Paragraph "best efforts" includes the payment of reasonable sums of money in consideration of Institutional Controls in the form of commitments or restrictive easements/covenants. If any commitments required under Subparagraph a are not obtained within 45 days of the date of entry of this Consent Decree, or any restrictive easements/covenants requested by EPA under Subparagraph b of this Paragraph are not submitted to EPA in draft form within 45 days of EPA's request for such restrictive easements/covenants, [*53] Performing Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps (including requests, offers, and responses thereto) that Performing Settling Defendants have taken to attempt to obtain such commitments or restrictive easements/covenants. The United States may, as it deems appropriate, assist Performing Settling Defendants in obtaining such commitments or restrictive

easements/covenants. Performing Settling Defendants shall reimburse the United States, in accordance with the procedures in Section XVII (Reimbursement of Response Costs), for all costs incurred by the United States in obtaining such commitments or restrictive easements/covenants.

25. If EPA determines that Institutional Controls in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the OU1 ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Performing Settling Defendants shall cooperate with EPA's efforts to secure such governmental controls, provided that Lomac reserves its rights to oppose any institutional controls [*54] which would interfere with its current operations. Nothing in this Consent Decree shall prevent Lomac from seeking the protection of the provisions of the 1987 Lomac Agreements, and Lomac reserves whatever rights it may have to protect its rights under the 1987 Lomac Agreements outside of the Dispute Resolution provisions of this Consent Decree if it believes pursuing such a remedy would expedite resolution of such a dispute. Lomac agrees to use its best efforts to promptly identify activities or requirements proposed pursuant to this Consent Decree that may interfere with Lomac's operations.

26. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations. Lomac reserves its rights with respect to access and institutional controls pursuant to the 1987 Lomac Agreements.

X. REPORTING REQUIREMENTS

27. In addition to any other requirement of this Consent Decree, Performing Settling Defendants shall submit to EPA and the State two copies of written progress reports that: (a) describe the [*55] actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Performing Settling Defendants or their contractors or agents in the previous reporting period; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Performing Settling Defendants have proposed to EPA or that have been approved by EPA; and (g) describe all activities [*56] undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Performing Settling Defendants shall submit these progress reports to EPA and the State by the twentieth day of every month following the entry of this Consent Decree until EPA notifies the Performing Settling Defendants pursuant to Paragraph 47.b of Section XIV (Certification of Completion) unless EPA determines that a less frequent submission is adequate. If requested by EPA or the State, Performing Settling Defendants shall also provide briefings for EPA and the State to discuss the progress of the Work.

28. The Performing Settling Defendants shall notify EPA within a reasonable time period of any change in the schedule described in the periodic progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, and if possible, no later than seven days prior to the performance of the activity.

29. Upon the occurrence of any event during performance of the Work that Performing Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning [*57] and Community Right-to-know Act (EPCRA), Performing Settling Defendants shall within 24 hours of the knowledge of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 5, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by

CERCLA Section 103 or EPCRA Section 304.

30. Within 20 days of the oral report submitted pursuant to Paragraph 29, Performing Settling Defendants shall furnish to Plaintiff a written report, signed by the Performing Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Performing Settling Defendants shall submit a report setting forth all actions taken in response thereto.

31. Performing Settling Defendants shall submit 4 copies of all plans, reports, and data required by the SOW, the Remedial Design Work [*58] Plan, the Remedial Action Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Performing Settling Defendants shall simultaneously submit 2 copies of all such plans, reports and data to the State.

32. All reports and other documents submitted by Performing Settling Defendants to EPA (other than the progress reports referred to above) which purport to document Performing Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Performing Settling Defendants.

XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

33. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Performing Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission [*59] without first providing Performing Settling Defendants at least one notice of deficiency and an opportunity to cure within 20 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

34. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 33(a), (b), or (c), Performing Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XXIII (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 33(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XXIV (Stipulated Penalties).

35. a. Upon receipt of a notice of disapproval pursuant to Paragraph 33(d), Performing Settling Defendants [*60] shall, within 20 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXIV, shall accrue during the 20-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 36 and 37.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 33(d), Performing Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Performing Settling Defendants of any liability for stipulated penalties under Section XXIV (Stipulated Penalties).

36. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Performing Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Performing [*61] Settling Defendants shall implement any such plan, report, or item as modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XXIII (Dispute Resolution).

37. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect,

Performing Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Performing Settling Defendants invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XXIII (Dispute Resolution) and Section XXIV (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Sections XXIII (Dispute Resolution) and XXIV (Stipulated Penalties).

38. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon [*62] approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XII. PROJECT COORDINATORS

39. Within 45 days of lodging this Consent Decree, Performing Settling Defendants, the State, and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties and the State at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Performing Settling Defendants' Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Performing Settling Defendants' Project Coordinator shall not be an attorney for any of the Performing [*63] Settling Defendants in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

40. Plaintiff may designate other representatives, including, but not limited to, Federal and State employees, and Federal or State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

41. EPA's Project Coordinator and the Performing [*64] Settling Defendants' Project Coordinator will meet on a monthly basis or on such other schedule as the Parties shall agree; such meetings may be held by teleconference upon the mutual agreement of both Project Coordinators.

XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

42. Within 60 days of entry of this Consent Decree, Performing Settling Defendants shall establish and maintain financial security in an amount sufficient to ensure that the total amount available to implement the Work, including any funds available for that purpose in the Initial Settlement Fund, Final Settlement Fund, and O & M Trust Fund established pursuant to Paragraph 50 of this Consent Decree, is not less than \$16 million. In computing the amount of funds available in the Initial and Final Settlement Funds, Performing Settling Defendants shall not include any funds committed to payments of Past Costs under Paragraph 51 or to the State. Such financial security shall be provided in one or more of the following forms:

- (a) A surety bond guaranteeing performance of the Work;
- (b) One or more irrevocable letters of credit equaling the total estimated cost of the Work remaining pursuant to Paragraph 46;

(c) A trust [*65] fund;

(d) A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of the Performing Settling Defendants; or

(e) A demonstration that one or more of the Performing Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f).

43. If the Performing Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 42(d) of this Consent Decree, Performing Settling Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Performing Settling Defendants seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 42(d) or (e), they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. In the event that EPA, after a reasonable opportunity for review and comment by the State, determines at any time that the financial assurances provided pursuant [*66] to this Section are inadequate, Performing Settling Defendants shall, within 45 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 42 of this Consent Decree. Performing Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

44. If Performing Settling Defendants can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 42 above after entry of this Consent Decree, Performing Settling Defendants may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Performing Settling Defendants shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Performing Settling Defendants may reduce the amount of the [*67] security in accordance with the final administrative or judicial decision resolving the dispute.

45. Performing Settling Defendants may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Performing Settling Defendants may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

XIV. CERTIFICATION OF COMPLETION

46. Completion of the Remedial Action

a. After Performing Settling Defendants conclude that any phase of the Remedial Actions, as defined in Section V of the SOW, has been fully performed, Performing Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Performing Settling Defendants or their authorized representative(s), EPA and the State if it so chooses. If, after the pre-certification inspection, the Performing Settling Defendants still believe that the phase of the Remedial Action under review has been fully performed, they may submit a written report requesting certification [*68] to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and the Performing Settling Defendants' Project Coordinator shall state that the phase of the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of a Performing Settling Defendant or the Performing Settling Defendants' Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for

submitting false information, including the possibility of fine and imprisonment for knowing violations."

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that [*69] the particular phase of the Remedial Action under review or any portion thereof has not been completed in accordance with this Consent Decree or that the pertinent Performance Standards have not been achieved, EPA will notify Performing Settling Defendants in writing of the activities that must be undertaken by Performing Settling Defendants pursuant to this Consent Decree to complete that phase of the Remedial Action. Provided, however, that EPA may only require Performing Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the OUI ROD," as that term is defined in Paragraph 13.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Performing Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Performing Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute [*70] resolution procedures set forth in Section XXIII (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting certification that a phase of the Remedial Action has been completed, and after a reasonable opportunity for review and comment by the State, that the phase of the Remedial Action appears at that time to have been performed in accordance with this Consent Decree, EPA will so certify in writing to Performing Settling Defendants. Certification of completion of a phase of the Remedial Action shall not in any way affect Performing Settling Defendants' obligations under this Consent Decree, including, but not limited to, the obligation to perform further construction activities under this Consent Decree if it subsequently appears that construction has not been fully or properly performed.

c. Within 90 days after Performing Settling Defendants conclude that all phases of the Remedial Action, including any necessary Contingent Remedial Actions, have been fully performed and the Performance Standards have been attained, Performing Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Performing Settling [*71] Defendants, EPA and the State. If, after the pre-certification inspection, the Performing Settling Defendants still believe that the Remedial Action has been fully performed and the Performance Standards have been attained, they shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and the Performing Settling Defendants' Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report may refer to or incorporate, and may rely on, relevant portions of the Remedial Action Completion Report for any phase of the Work. The report shall contain the following statement, signed by a responsible corporate official of a Performing Settling Defendant or the Performing Settling Defendants' Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are [*72] significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action, including and necessary Contingent Remedial Actions, or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Performing Settling Defendants in writing of the activities that must be undertaken by Performing Settling Defendants pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards. Provided, however, that EPA may only require Performing Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the OUI ROD," as that term is defined in Paragraph 13.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Performing [*73] Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Performing Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules

established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution).

d. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion, and after a reasonable opportunity for review and comment by the State, that all phases of the Remedial Action, including any necessary Contingent Remedial Actions, have been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Performing Settling Defendants. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXV (Covenants Not to Sue by Plaintiff). Certification of Completion of the Remedial Action shall not affect Performing Settling Defendants' obligations under [*74] this Consent Decree.

47. Completion of the Work

a. Within 90 days after Performing Settling Defendants conclude that all phases of the Work (including O & M), have been fully performed, Performing Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Performing Settling Defendants, EPA and the State. If, after the pre-certification inspection, the Performing Settling Defendants still believe that the Work has been fully performed, Performing Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The written report may refer to or incorporate, and may rely on, relevant portions of the Construction Completion report and the Remedial Action Completion report. The report shall contain the following statement, signed by a responsible corporate official of a Performing Settling Defendant or the Performing Settling Defendants' Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. [*75] I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Performing Settling Defendants in writing of the activities that must be undertaken by Performing Settling Defendants pursuant to this Consent Decree to complete the Work. Provided, however, that EPA may only require Performing Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the OU1 ROD," as that term is defined in Paragraph 13.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Performing Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Performing Settling Defendants shall perform all activities described in the [*76] notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Performing Settling Defendants and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Performing Settling Defendants in writing.

XV. EMERGENCY RESPONSE

48. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Performing Settling Defendants shall, subject to Paragraph 49, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the [*77] Performing Settling Defendants shall notify

the EPA Emergency and Enforcement Response Branch, Region 5. Performing Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Performing Settling Defendants fail to take appropriate response action as required by this Section, and EPA takes such action instead, Performing Settling Defendants shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVII (Reimbursement of Response Costs).

49. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, or the State: a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site; or b) to direct or order such action, or seek an order from the Court, to protect human health and the [*78] environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXV (Covenants Not to Sue by Plaintiff).

XVI. PAYMENT OF FUNDS BY SETTLING DEFENDANTS

50. a. Within 30 days after lodging of this Consent Decree, Settling Defendants shall submit to Plaintiff a signed trust agreement (the "Trust Agreement"), in the form attached hereto as Appendix H, evidencing the establishment of a Trust including the Initial Settlement Fund, the Final Settlement Fund, and the O & M Trust Fund. The Trust Agreement shall confer upon the Trustee sufficient powers and authority to issue assessments, receive and administer funds from Settling Defendants necessary to finance the Work and to make other payments required under this Consent Decree, in accordance with their obligations under this Consent Decree.

b. Within 40 days after the effective date of this Consent Decree, Settling Defendants shall make payments into the Initial Settlement Fund and the Final Settlement Fund in the amounts provided for each such party in Appendix D to this Consent Decree. Any Settling Defendant that fails to make the payment required [*79] by this Subparagraph on a timely basis shall pay the United States Interest on the unpaid balance. The Interest shall begin to accrue beginning on the day after payment was due. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of a Settling Defendant's failure to make timely payments under this Section. The provisions of Paragraphs 50.c and 50.e notwithstanding, no amount of Akzo Nobel's payment pursuant to this Paragraph or any interest thereon shall be used for payment of required Interest or penalty payments. The Trust Agreement shall instruct the Trustee to provide written notice of receipt of each such payment, within no longer than 10 days of receipt, to the Settling Defendants and to EPA.

c. The Trust Agreement shall instruct the Trustee to collect and use the money in Initial Settlement Fund to: (1) reimburse the United States for Past Response Costs as provided in Paragraph 51; (2) reimburse the State for \$170,000 of its past response activity costs pursuant to the State Consent Decree; (3) pay the State \$500,000 pursuant to the State Consent Decree to resolve Natural Resource Damages [*80] claims; (4) make payment into the OU2 Special Account as provided in Paragraph 52.a; (5) pay for Work under this Consent Decree; (6) transfer funds remaining in the Initial Settlement Fund into the O & M Trust Fund at the fifth year anniversary of the time EPA certifies pursuant to Paragraph 46.b. that all Remedial Action construction activities have been fully and successfully completed to the extent funds remain after all reimbursements described below have been made; and (7) pay other costs and expenses, including any required Interest and penalty payments to the United States, necessary to fulfill the requirements of this Consent Decree. The Trust Agreement shall further instruct the Trustee to reimburse Performing Settling Defendants for up to \$1 million of their unreimbursed Site past response costs from funds remaining in the Initial Settlement Fund at the fifth year anniversary of the time EPA certifies pursuant to Paragraph 46.b. that all Remedial Action construction activities have been fully and successfully completed; except that no such reimbursement shall be allowed to the extent that: (i) the amount remaining in the Initial Settlement Fund after the reimbursement would [*81] be insufficient to meet the obligations required to be funded from the Initial Settlement Fund under this Consent Decree; or (ii) any Performing Settling Defendant's contribution to the Initial Settlement Fund, net of any reimbursement, would be less than the amount specified in Appendix D for such Performing Settling Defendant. Such payments shall be made from the Initial Settlement Fund to the extent sufficient funds exist therein, with Performing Settling Defendants making up for any shortfall to fulfill their

obligations under this Consent Decree.

d. The Trust Agreement shall instruct the Trustee to collect and use the money in Final Settlement Fund to: (1) pay for Contingent Remedial Actions specified in this Consent Decree and the SOW; (2) pay for Work other than Contingent Remedial Actions under this Consent Decree, if and only if the Performing Settling Defendants have expended \$7.8 million in principal from the Initial Settlement Fund (exclusive of any mixed funding reimbursement obtained from the Superfund under Section XX of this Consent Decree) toward performance of Work and other obligations under this Consent Decree; (3) reimburse EPA and the State for Past Response [*82] Costs as provided in Paragraph 59 of this Consent Decree; and (4) pay other costs and expenses necessary to fulfill the requirements of this Consent Decree. Payment shall be made from the Final Settlement Trust Account to the extent sufficient funds exist therein, with Performing Settling Defendants making up for any shortfall.

e. The Trust Agreement shall instruct the Trustee to collect and use the money in O & M Trust Fund as follows: (1) to receive payment from the OU1 Special Account as provided in Paragraph 57 of this Consent Decree, from the Initial Settlement Fund as provided in Paragraph 50.c of this Consent Decree, and from Performing Settling Defendants for use in paying for Operation and Maintenance of the Remedial Action; (2) to pay for performance of O&M; (3) to pay other costs and expenses related to O & M, including any required Future Response Cost and penalty payments incurred after the funding of the O & M Trust Fund pursuant to Paragraph 50.a to the United States, necessary to fulfill the requirements of this Consent Decree; and (4) to reimburse EPA and the State for response costs as provided in Paragraph 50.h of this Consent Decree.

f. Pursuant to the terms of [*83] the Trust Agreement, if the cost of the Work or other payments required under this Consent Decree exceeds the amounts paid under this Paragraph of this Consent Decree, Performing Settling Defendants, upon notification from, and within the time prescribed by, the Trustee (but no later than 60 days after notification), shall be responsible for and shall pay to the appropriate Trust Account such additional amounts, in the same proportions relative to each other as set forth in Appendix D (or such other proportions to which the Settling Defendants have agreed among themselves). If any Performing Settling Defendant fails to pay any such additional amount, upon notice by the Trustee, the other Performing Settling Defendants shall pay that amount in the same proportions relative to each other, as set forth in Appendix D (or such other proportions to which the Performing Settling Defendants have agreed among themselves) within 60 days of notice by the Trustee. The failure of any Performing Settling Defendant to pay for its share of the costs of the Work or other payments required by this Consent Decree shall not excuse any failure by Performing Settling Defendants to timely complete the Work [*84] or to reimburse costs, as required by this Consent Decree.

g. The Trustee shall submit a financial report to the Settling Defendants on an annual basis, beginning six months after the entry of this Consent Decree. The Trustee shall also provide a copy of the financial reports to the United States. The financial report shall describe the financial condition of the Initial Settlement Fund, the Final Settlement Fund and the O & M Trust Fund, and shall include cash flow projections concerning the level of funds that will be necessary for Work to be performed and other required payments to be made in the succeeding year. If the amount of money in any Trust Account is less than such projected level, Performing Settling Defendants shall make the necessary additional payments, in the same proportions relative to each other as set forth in Appendix D (or such other proportions to which the Performing Settling Defendants have agreed among themselves). Those payments shall be made within a time sufficient to assure uninterrupted and timely completion of Performing Settling Defendants' obligations under this Consent Decree. The Trustee shall notify Performing Settling Defendants and the United [*85] States of the amount of, and the time within which, the payments are required. Except as expressly provided in this Consent Decree, payments into the Initial Settlement Fund, the Final Settlement Fund, and the O & M Trust Fund do not constitute fines, penalties or monetary sanctions of any kind.

h. Performing Settling Defendants may terminate the Initial Settlement Fund and the Final Settlement Fund with prior written approval by EPA, so long as sufficient financial assurance exists for performance of Performing Settling Defendants' obligations under the Consent Decree. The O & M Trust Fund may be terminated only upon certification by EPA of the completion of all Work, including all O & M, required by this Consent Decree. Any funds in the O & M Trust Fund not required to meet the O & M obligations of the Performing Settling Defendants under this Consent Decree shall be distributed 17% to the State to reimburse a portion of the State's response costs,

and 83% to the general EPA Hazardous Substances Superfund to reimburse a portion of the United States' response costs. Final distributions from the O & M Trust Fund to the State and EPA under the preceding sentence shall be made within [*86] 60 days following EPA's certification of completion of the Work pursuant to Paragraph 47.b; and interim distributions in accordance with the preceding sentence shall be made upon EPA's written notice to the Trustee that EPA is satisfied that the amount remaining in the O & M Trust Fund following the interim distribution will be at least 1.5 times the amount of the most recent estimated cost to complete the Work prepared pursuant to Paragraph 44 of this Consent Decree.

XVII. REIMBURSEMENT OF RESPONSE COSTS

51. Within 60 days of the effective date of this Consent Decree, Settling Defendants shall cause funds to be transferred from the Initial Settlement Fund to pay to the EPA Hazardous Substance Superfund \$30,000 in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 98Z0323, the EPA Region and Site/Spill ID # 0534, and DOJ case number 90-11-3-191A. Provided, however, that payment under this Paragraph (including payment of any Interest thereon pursuant to Paragraph 55) shall not be due until [*87] 20 days after the Trustee has received at least \$7 million in payments into the Initial Settlement Fund pursuant to Paragraph 50.b. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Western District of Michigan following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXX (Notices and Submissions) and to: Chief, Program Accounting and Analysis Section, EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604-3590.

52. Future Response Costs.

Future Response Costs for OU2

a. Within 60 days of the effective date of this Consent Decree, Settling Defendants shall cause funds to be transferred from the Initial Settlement Fund to pay to the EPA Hazardous Substance Superfund \$2,000,000 in payment of Future Response Costs to be incurred and paid with respect to OU2, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. [*88] Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 98Z0323, the EPA Region and Site/Spill ID # 0534, and DOJ case number 90-11-3-191A. Provided, however, that payment under this Subparagraph (including payment of any Interest thereon pursuant to Paragraph 55) shall not be due until 20 days after the Trustee has received at least \$7 million in payments into the Initial Settlement Fund pursuant to Paragraph 50.b. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Western District of Michigan following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXX (Notices and Submissions) and to: Chief, Program Accounting and Analysis Section, EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604-3590. Payment shall be made from the Initial Settlement Fund to the extent sufficient [*89] funds exist therein, with Performing Settling Defendants making up for any shortfall. EPA shall place this payment into the OU2 Special Account within the Superfund, established for the purpose of funding final Site OU2 remedial actions after issuance of a Final Site ROD by EPA. Funds in the OU2 Special Account may be used, at the sole discretion of EPA, in implementing the final Site OU2 remedial actions.

b. To the extent EPA determines that some or all of the funds in the OU2 Special Account are not necessary for the final Site OU2 remedial action, EPA will distribute 17% of such funds to the State to reimburse a portion of the State's response costs and shall transfer 83% of those funds remaining in the OU2 Special Account to the general EPA Hazardous Substances Superfund to reimburse a portion of the United States' response costs.

Future Response Costs for OU1

53. Performing Settling Defendants shall reimburse the EPA Hazardous Substance Superfund for all Future Response Costs related to OU1 not inconsistent with the National Contingency Plan. The United States will send Performing Settling Defendants a bill requiring payment that includes an Itemized Cost Summary, and copies [*90] of any relevant contractors' progress reports for payments in excess of \$25,000, on a periodic basis. Performing Settling Defendants shall make all payments within 45 days of Performing Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 54. The Performing Settling Defendants shall make all payments required by this Paragraph: (a) in the form of a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA Site/Spill ID # 0534, the DOJ case number 90-11-3-191A, and the name and address of the party making payment. The Performing Settling Defendants shall send the check(s) to U.S. EPA, Region 5, Attention: Program Accounting and Analysis Section, P.O. Box 70753, Chicago, Illinois 60673, or (b) by EFT to the EPA lockbox account in accordance with current electronic funds transfer procedures, referencing EPA Site/Spill ID # 0534, and DOJ case number 90-11-3-191A. Payment by EFT shall be made in accordance with instructions provided to the Performing Settling Defendants by the EPA following issuance of the bill. Any payments received by the EPA after 4:00 P.M. (Central Time) will [*91] be credited on the next business day. Performing Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXX (Notices and Submissions) and to: Chief, Program Accounting and Analysis Section, EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604-3590. Payment under this Subparagraph shall be made from the Initial Settlement Fund to the extent sufficient funds exist therein, with Performing Settling Defendants making up any shortfall. The obligations of the Performing Settling Defendants to pay amounts owed under this Consent Decree are joint and several. Performing Settling Defendants shall not seek reimbursement under Sections XVIII or XIX of this Consent Decree for payments made pursuant to this Paragraph or Paragraphs 54-55.

54. Performing Settling Defendants may contest payment of any Future Response Costs under Paragraph 53 if they determine that the United States has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States pursuant [*92] to Section XXX (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Performing Settling Defendants shall within 45 days of receipt of the bill pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 53. Payment under this Paragraph shall be made from the Initial Settlement Fund to the extent sufficient funds exist therein, with Performing Settling Defendants making up any shortfall. The obligations of the Performing Settling Defendants to pay amounts owed under this Consent Decree are joint and several. Simultaneously, the Performing Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Michigan and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Performing Settling Defendants shall send to the United States, as provided in Section XXX (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes [*93] and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Performing Settling Defendants shall initiate the Dispute Resolution procedures in Section XXIII (Dispute Resolution). If the United States prevails in the dispute, within 5 days of the resolution of the dispute, the Performing Settling Defendants shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 53. If the Performing Settling Defendants prevail concerning any aspect of the contested costs, the Performing Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States in the manner described in Paragraph 53; Performing Settling Defendants shall be disbursed any balance of the escrow account. The dispute resolution procedures set [*94] the exclusive mechanisms for resolving disputes regarding the Performing Settling Defendants' obligation to reimburse the United States for its Future Response Costs.

55. In the event that the payments required by Paragraph 50.b are not made within 40 days of the effective date of this Consent Decree or that the payments required by Paragraphs 51 and 52.a are not made within 60 days of the effective date of this Consent Decree, Performing Settling Defendants shall pay Interest on the unpaid balance. The Interest to be paid on payments to the Initial Settlement Fund under this Paragraph shall begin to accrue 40 days

after the effective date of this Consent Decree. The Interest to be paid on Past Response Costs and Future Response Costs for OU2 under this Paragraph shall begin to accrue 60 days after the effective date of this Consent Decree. The Interest on Future Response Costs for OU1 shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the withdrawal from the OU1 Special Account. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Performing Settling Defendants' [*95] failure to make timely payments under this Section. The Performing Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 51.

56. The Performing Settling Defendants recognize that all contractor progress reports provided to them by EPA under this Consent Decree may be entitled to confidential treatment under 40 C.F.R. Part 2, Subpart 2, and the Performing Settling Defendants agree that they shall handle all such documents as follows:

(i.) Any representative of the Performing Settling Defendants who obtains contractor progress reports under this Paragraph, and any party or nonparty in this case subject to this paragraph, shall not disclose or permit disclosure of this information to any other person, except in the following circumstances:

A. Disclosure may be made to employees of, or counsel for, Performing Settling Defendants who have responsibility for the preparation for payment or litigation with respect to this paragraph of the Consent Decree. Any employee to whom disclosure is made shall be advised of, and become subject to, the provisions of this paragraph prior to such disclosure by executing the Confidentiality Agreement [*96] attached hereto as Appendix I. Employees do not include persons, firms, or corporations engaged by the Performing Settling Defendants, on a contract basis, who shall be subject to the requirements of Subparagraph i.B. below.

B. Disclosure may be made to consultants, witnesses, or experts (collectively, "Experts") employed or otherwise engaged by any party or counsel to any party to assist in the preparation for payment under this Paragraph of the Consent Decree. Prior to disclosure to any Expert, the Expert must agree to be bound by the terms of this Paragraph by executing the Confidentiality Agreement attached hereto. A copy of each executed Confidentiality Agreement shall be furnished to the Plaintiff not less than 5 business days prior to disclosure to the Expert.

(ii.) The Performing Settling Defendants, their counsel, and any other person who obtains any contractor progress report pursuant to this Paragraph, shall take all necessary and appropriate measures to maintain the confidentiality of the report, shall share such information only with persons authorized to receive it pursuant to this Consent Decree, and shall retain the information in a secure manner. Except as provided [*97] in Subparagraph i.B. above, no other person shall be permitted access to the information.

(iii.) Any person who obtains access to contractor progress reports under this Paragraph may make copies, duplicates, extracts, summaries, or descriptions of the information or any portion thereof only for the purpose of preparation for payment, negotiation or litigation in connection with this Paragraph of the Consent Decree. All copies, duplicates, extracts, summaries, etc. shall be subject to the terms of this Paragraph to the same extent and manner as original documents.

(iv.) Any contractor progress report which is filed with the Court shall be filed under seal. If any such documents have been sealed and filed with the Court, the relevant contractor(s) shall be informed of this by the filing party at the time of filing.

(v.) Any unauthorized disclosure of information designated as confidential under this Consent Decree shall not result in a waiver of any contractor's claim of confidentiality.

(vi.) Within 60 days after final payment of any bill under this Paragraph of the Consent Decree, whether by judgment, settlement or otherwise, or as may be determined by the Court or EPA:

A. Any [*98] person who obtained contractor progress reports related to that bill shall assemble and return such information to Plaintiff, including all copies, duplicates, extracts, summaries, or descriptions of the information or portions thereof. Such return shall be certified in writing by the person who obtained the information from EPA. All

such information covered by this Subparagraph which constitutes the work product of counsel shall be destroyed; and

B. The Clerk of the Court shall maintain under seal all papers filed under seal until the Court orders otherwise.

XVIII. TRANSFER AND USE OF SPECIAL ACCOUNT FUNDS

57. The OU1 Special Account shall be used as follows:

a. In the event that EPA takes over the response activities at the Site, EPA may, in its sole discretion, use the remaining funds in the OU1 Special Account to fund such response activities.

b. EPA agrees to make available certain funds in the OU1 Special Account to the Performing Settling Defendants to pay for performance of certain response actions performed under this Consent Decree.

i. Performing Settling Defendants shall have the right to submit annual requests for reimbursement of Operation and Maintenance costs [*99] incurred and paid by the Performing Settling Defendants after November 1, 1999 and before the submission of a claim under Paragraph 57.b.ii below;

ii. At the fifth year anniversary of the time EPA certifies pursuant to Paragraph 46.b. that all Remedial Action construction activities have been fully and successfully completed, Performing Settling Defendants shall have the right to submit a request for reimbursement of their unreimbursed costs of performing the Remedial Action (other than those costs for which reimbursement is pending pursuant to Section XX or Paragraph 57.b.i); provided, however, that the amount to be reimbursed to the Performing Settling Defendants shall not exceed the estimated present worth of the cost to complete the then-remaining O & M required by this Consent Decree (as prepared by the Performing Settling Defendants and reviewed and approved by EPA), less the value of any funds remaining in the Initial Settlement Fund after the accounting and reimbursements made pursuant to Paragraph 50.c.

c. When submitting requests for reimbursement as provided in Paragraph 57.b, Performing Settling Defendants shall submit to EPA a certification of the complete and accurate [*100] total costs claimed for the relevant time period. Performing Settling Defendants' certifications shall contain the following statement signed by the Performing Settling Defendants' accountant:

"To the best of my knowledge, after thorough investigation and review of Performing Settling Defendants' detailed cost documentation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Performing Settling Defendants' certification submittals shall include a copy of the relevant contractors' billing invoices or statements reflecting the true and accurate total of response costs as certified, in the relevant time period. Within 60 days of EPA's receipt of each of Performing Settling Defendants' certifications, EPA shall approve or disapprove of Performing Settling Defendants' certification in accordance with the criteria set forth in this Section and, within 90 days after EPA determines some or all of such costs have been adequately demonstrated and are consistent with the NCP, [*101] EPA shall distribute an amount equal to such adequately demonstrated costs consistent with the NCP from the OU1 Special Account into the Initial Settlement Fund (or in the case of payments made pursuant to Paragraph 57.b.ii, into the O & M Trust Fund), except as limited by Paragraph 57.b.ii, to the extent such funds are available in the OU1 Special Account. If EPA disapproves of all or any portion of Performing Settling Defendants' certified costs submitted pursuant to this Paragraph, EPA shall at the same time provide Performing Settling Defendants with its reasons for such disapproval in writing. Until the OU1 Special Account is depleted, EPA shall reimburse Performing Settling Defendants for the response costs described in Paragraph 57.b, as duly certified by Performing Settling Defendants and as approved by EPA pursuant to this Paragraph, provided, however, that such costs are consistent with the NCP and are not the result of an accounting error. Performing Settling Defendants waive any and all rights to dispute EPA's determination of the amount of funds remaining in the OU1 Special Account.

d. Performing Settling Defendants' submittal of the complete and accurate total of relevant [*102] response costs incurred and paid, as required to be certified to EPA pursuant to Paragraph 57.c above, shall not include: (i) costs incurred prior to the effective date of this Consent Decree; (ii) attorneys fees or costs except to the extent that such fees are demonstrated to be reasonable, required, allocable, and directly necessary for the implementation of the Remedial Design or Remedial Action (e.g., attorneys' fees for drawing necessary contract documents); (iii) costs of any response activities that were not required under, or approved by EPA pursuant to, this Consent Decree; (iv) internal costs of the individual Performing Settling Defendants, including but not limited to, salaries, travel, in-kind services, whether or not those costs were reimbursed or paid by the Performing Settling Defendants; or (v) stipulated or other penalty payments.

e. The United States' obligation to make any payment under Paragraph 57 of this Consent Decree will terminate without reservation: (i) upon EPA's assumption of performance of any portion of the Work pursuant to Paragraph 89.a of this Consent Decree (Work Takeover); or (ii) upon EPA's determination that an intentionally false or fraudulent [*103] certification was submitted pursuant to Paragraph 57.c of this Consent Decree. However, such termination of the United States' obligation is not effective until any dispute with respect to such a termination is resolved pursuant to Section XXIII (Dispute Resolution) of this Consent Decree.

f. To the extent any funds remain in the OU1 Special Account after the distribution described in Paragraphs 57.b and 57.c, EPA shall distribute 17% of such funds to the State to reimburse a portion of the State's response costs, and shall transfer 83% of such funds to the general EPA Hazardous Substances Superfund to reimburse a portion of the United States' response costs.

XIX. TRANSFER AND USE OF FINAL SETTLEMENT FUND

58. The Final Settlement Fund shall be established for the primary purpose of paying the costs of performance of Contingent Remedial Actions. The Final Site Settlement Fund may also be used for other purposes as specified in this Consent Decree. The Final Settlement Fund shall initially contain \$4.5 million, to be funded by the Settling Defendants as described in Appendix D. Performing Settling Defendants may use the funds in the Final Settlement Fund if, and only if they [*104] have expended or irrevocably committed to expend a minimum of \$7.8 million in principal from the Initial Settlement Fund toward performance of Work and other obligations under this Consent Decree, exclusive of any mixed funding reimbursement obtained from the Superfund under Section XX of this Consent Decree. If Performing Settling Defendants intend to make withdrawals from the Final Settlement Account at any time prior to the time disbursements are to be made under Paragraph 59 of this Consent Decree, Performing Settling Defendants shall provide to EPA and the State 30 days advance written notice of the intended withdrawal.

59. Upon the fifth year anniversary of EPA's final certification pursuant to Paragraph 46.b. that all Remedial Action construction activities (excluding Contingent Remedial Action activities) have been fully and successfully completed, Performing Settling Defendants shall provide a detailed accounting of: (1) all funds they have expended directly on performance of Contingent Remedial Actions under this Consent Decree; and (2) all funds remaining in the Final Settlement Fund. Within 60 days after EPA's approval of the accounting, in consultation with MDEQ, all [*105] funds (including accumulated interest) remaining in the Final Settlement Fund will be distributed as follows: 41.5% of remaining funds to the EPA Hazardous Substances Superfund to reimburse EPA's unrecovered Site response costs, including Past Response Costs; 8.5% of remaining funds to MDEQ to reimburse a portion of its response costs; and 50% to the Performing Settling Defendants, distributed on a pro rata basis to their individual contributions to the Site response actions, provided however, that the Performing Settling Defendants will make up any shortfall if the amount to be distributed to EPA is less than \$1,867,500 and the amount to be distributed to MDEQ is less than \$382,500. Any payments to the EPA under this Paragraph shall be made consistent with the provisions of Paragraph 53. Any payments to the State under this Paragraph shall be made by check payable to the "State of Michigan - Environmental Response Fund" and shall be sent by first-class mail to: Cashier's Office, Michigan Department of Environmental Quality, P.O. Box 30657, Lansing, Michigan 48909 or, via courier, to Cashier's Office, Michigan Department of Environmental Quality, Knapp's Office Center, Suite 457, [*106] 300 South Washington Square, Lansing, Michigan 48933. The Bofors Nobel Superfund Site, Case No. ___, and ERD Account No. ERD 3003 shall be identified on each check. A copy of the transmittal letter and check shall be provided simultaneously to the Chief, Compliance and Enforcement Section, Environmental Response Division,

Michigan Department of Environmental Quality, P.O. Box 30426, Lansing, Michigan 48909, and the Assistant Attorney General in Charge, Natural Resources Division, Michigan Department of Attorney General, 300 South Washington Square, Suite 315, Lansing, Michigan 48913.

XX. CLAIMS AGAINST THE SUPERFUND

60. a. As provided in the PDD, Performing Settling Defendants may jointly submit a claim, pursuant to Sections 111(a)(2), 112, and 122(b)(1) of CERCLA, 42 U.S.C. §§ 9611(a)(2), 9612, and 9622(b)(1), for reimbursement (subject to the limitations set forth in subparagraph c below) from the Hazardous Substance Superfund for up to the specified percentages of the necessary costs incurred in completing the Remedial Design and the Remedial Action in accordance with this Consent Decree and Appendix F (Preauthorization Decision Document). Reimbursement from the Superfund [*107] shall be subject to the provisions of Section 112 of CERCLA, the regulations set forth in 40 C.F.R. Part 307, and the applicable claims and audits procedures specified in Appendix F, shall be made in accordance with the procedures outlined in Appendix F, and shall be deposited into the Trust established under Paragraph 50 and become part of the Initial Settlement Fund. Performing Settling Defendants' claim(s) against the Superfund may cover only those costs incurred during the implementation of the Remedial Design and Remedial Action, and may include attorneys' fees to the extent that such fees are directly necessary for the implementation of the Remedial Design or Remedial Action (e.g., attorneys' fees for drawing necessary contract documents), and otherwise meet the requirements of 40 C.F.R. Part 307. Except as provided in Section XVII (Reimbursement of Costs) and Section XVIII (Transfer and Use of Special Account Funds), Performing Settling Defendants shall be solely responsible for all Operation and Maintenance costs, Future Response Costs, and any other type of attorneys' fees (e.g., fees related to evaluating or establishing the liability of Performing Settling Defendants [*108] or any person, pursuing a claim against any other person, defending a claim by the United States or any other person, evaluating Performing Settling Defendants' submissions under, or compliance with, the terms of this Consent Decree, or advising or representing Performing Settling Defendants in any action or dispute resolution under this Consent Decree or in any action or proceeding to enforce this Consent Decree), and may not submit a claim against the Superfund for these costs.

b. If it is subsequently determined by EPA that it is necessary to modify the actions that EPA preauthorized, Performing Settling Defendants may submit to EPA a revised application for preauthorization, and EPA will consider such application and may, in its sole discretion, authorize the Performing Settling Defendants to submit claims (subject to the limitations of subparagraph c below) for these modified actions.

c. Notwithstanding any provision of 40 C.F.R. 307(I) or EPA's approval of any modified actions, Performing Settling Defendants may not submit revised applications or claims that exceed 47% of the necessary costs incurred, and in no event shall Performing Settling Defendants' total claim(s) against [*109] the Superfund under this Section exceed the sum of \$7,200,000.

d. If the Agency denies a claim for reimbursement in whole or in part, it shall notify the Performing Settling Defendants of the reason for such denial. Within 30 days after receiving notice of EPA's decision, the Performing Settling Defendant may request an administrative hearing as provided in Section 112(b)(2) of CERCLA, 42 U.S.C. 9612(b)(2), and 40 C.F.R. Part 307. If EPA fails to pay Performing Settling Defendants' claim within sixty (60) days of receipt of a perfected claim, as defined in 40 C.F.R. Section 307(14), interest shall accrue on the amount due and payable to the Performing Settling Defendant.

e. Pursuant to Section 112(c)(1) of CERCLA, 42 U.S.C. § 9612(c)(1), Performing Settling Defendants hereby subrogate their rights to the United States to recover from other parties any costs reimbursed to the Performing Settling Defendants under this Section, and Performing Settling Defendants and Performing Settling Defendants' contractors shall assist in any action to recover these costs which may be initiated by the United States. All of the Performing Settling Defendants' contracts for implementing the preauthorization [*110] decision document shall include a specific requirement that the contractors agree to provide this cost recovery assistance to the United States. The cost recovery assistance shall include, but not be limited to, furnishing the personnel, services, documents, and materials requested by the United States to assist the United States in documenting the work performed and costs expended by Performing Settling Defendants or Performing Settling Defendants' contractors at the Site in order to

aid in cost recovery efforts. Assistance shall also include providing all requested assistance in the interpretation of evidence and costs, and providing requested testimony.

f. The Performing Settling Defendants shall not make any claim against the Superfund for any costs incurred in submitting applications and claims or contesting denial of claims pursuant to this Paragraph.

XXI. INDEMNIFICATION AND INSURANCE

61. a. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Performing Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Performing Settling Defendants shall indemnify, save and hold harmless [*111] the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Performing Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Performing Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Performing Settling Defendants agree to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Performing Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. The United States [*112] shall not be held out as a party to any contract entered into by or on behalf of Performing Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the Performing Settling Defendants nor any such contractor shall be considered an agent of the United States.

b. The United States shall give Performing Settling Defendants notice of any claim for which the United States plans to seek indemnification pursuant to Paragraph 61.a., and shall consult with Performing Settling Defendants prior to settling such claim.

62. Settling Defendants waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays other than those reimbursements authorized in Sections XVIII (Transfer and Use of Special Account Funds) and XX (Claims Against the Superfund). In addition, Performing Settling Defendants shall indemnify and hold harmless the United [*113] States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Performing Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

63. No later than 15 days before commencing any on-site Work, Performing Settling Defendants shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 46.d. of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of \$8 million dollars, combined single limit, and automobile liability insurance with limits of \$8 million dollars, combined single limit, naming the United States and the State as additional insureds. In addition, for the duration of this Consent Decree, Performing Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Performing [*114] Settling Defendants in furtherance of this Consent Decree. Prior to commencement of any on-Site Work under this Consent Decree, Performing Settling Defendants shall provide to EPA certificates of such insurance and a copy of each insurance policy. Performing Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the effective date of this Consent Decree, if requested. If Performing Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or

subcontractor, Performing Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XXII. FORCE MAJEURE

64. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Performing Settling Defendants, of any entity controlled by Performing Settling Defendants, or of Performing Settling Defendants' contractors, that delays or prevents the performance [*115] of any obligation under this Consent Decree despite Performing Settling Defendants' best efforts to fulfill the obligation. The requirement that the Performing Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

65. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Performing Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director, Superfund Division, EPA Region 5, within 48 hours of when Performing Settling Defendants first knew that the event might cause a delay. Within 5 days thereafter, [*116] Performing Settling Defendants shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Performing Settling Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Performing Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Performing Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Performing Settling Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Performing Settling Defendants shall be deemed to know of any circumstance of which Performing [*117] Settling Defendants, any entity controlled by Performing Settling Defendants, or Performing Settling Defendants' contractors knew or should have known.

66. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Performing Settling Defendants in writing of its decision. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay is attributable to a force majeure event, EPA will notify the Performing Settling [*118] Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

67. If the Performing Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Performing Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Performing Settling Defendants complied with the requirements of Paragraphs 64 and 65, above. If Performing Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Performing Settling Defendants of the affected obligation of this Consent

Decree identified to EPA and the Court.

XXIII. DISPUTE RESOLUTION

68. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution [*119] procedures of this Section shall be the exclusive mechanism to resolve all disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Performing Settling Defendants that have not been disputed in accordance with this Section.

69. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen upon receipt by one party of written Notice of Dispute sent by another party.

70. a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 10 days after the conclusion of the informal negotiation period, Performing Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on [*120] the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Performing Settling Defendants. The Statement of Position shall specify the Performing Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 71 or Paragraph 72.

b. Within 14 days after receipt of Performing Settling Defendants' Statement of Position, EPA will serve on Performing Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 71 or 72. Within 7 days after receipt of EPA's Statement of Position, Performing Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and the Performing Settling Defendants as to whether dispute resolution should proceed under Paragraph 71 or 72, the parties to the dispute shall follow the [*121] procedures set forth in the paragraph determined by EPA to be applicable. However, if the Performing Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 71 and 72.

71. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Performing Settling Defendants regarding the validity of the OU1 ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and [*122] shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Superfund Division, EPA Region 5, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 71.a. This decision shall be binding upon the Performing Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 71.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 71.b. shall be reviewable by this Court,

provided that a motion for judicial review of the decision is filed by the Performing Settling Defendants with the Court and served on all Parties within 17 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Performing Settling Defendants' [*123] motion.

d. In proceedings on any dispute governed by this Paragraph, Performing Settling Defendants shall have the burden of demonstrating that the decision of the Superfund Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 71.a.

72. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Performing Settling Defendants' Statement of Position submitted pursuant to Paragraph 70, the Director of the Superfund Division, EPA Region 5, will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be binding on the Performing Settling Defendants unless, within 17 days of receipt of the decision, the Performing Settling Defendants file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties [*124] to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Performing Settling Defendants' motion.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

73. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Performing Settling Defendants under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 81. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Performing Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXIV (Stipulated Penalties).

XXIV. STIPULATED PENALTIES

74. Performing [*125] Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 75 and 76 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XXII (Force Majeure). "Compliance" by Performing Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

75. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph b:

Penalty Per Violation Per Day	Period of Noncompliance
\$ 500	1-7 days
\$ 2,500	8-21 days
\$ 8,000	22 days or longer

b.

Submit Remedial Action Work Plan

Submit Construction Quality Assurance Plan

Advertise Construction Contract

Award Bid for Construction

Submit Final Operation and Maintenance Plan
Failure to Comply with Approved Plans [*126]

Complete Construction

Failure to Take Action to Abate an Endangerment under Section XV (Emergency Response)

76. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs 27-30:

Penalty Per Violation Per Day	Period of Noncompliance
\$ 50	1-7 days
\$ 250	8-21 days
\$ 750	22 days or longer

77. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Performing Settling Defendants of any deficiency; (2) with respect to a decision by the Director of the Superfund Division, EPA Region 5, under Paragraph 71.b. or 72.a. of Section XXIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the [*127] date that Performing Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XXIII (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

78. Following EPA's determination that Performing Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give Performing Settling Defendants written notification of the same and describe the noncompliance. EPA may send the Performing Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Performing Settling Defendants of a violation.

79. All penalties accruing under this Section shall be due and payable to the United States [*128] within 30 days of the Performing Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Performing Settling Defendants invoke the Dispute Resolution procedures under Section XXIII (Dispute

Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to P.O. Box 70753, Chicago, Illinois 60604-3590, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # 0534, the DOJ Case Number 90-11-3-191A, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXX (Notices and Submissions), and to: Chief, Program Accounting and Analysis Section, EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604-3590.

80. The payment of penalties shall not alter in any way Performing Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

81. Penalties shall continue to accrue as provided in [*129] Paragraph 77 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within 30 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Performing Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Performing Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Performing Settling Defendants to the extent [*130] that they prevail.

82. a. If Performing Settling Defendants fail to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. Performing Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 79.

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Performing Settling Defendants' violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(1) of CERCLA. Provided, however, that the United States shall not seek civil penalties pursuant to Section 122(1) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

83. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XXV. [*131] COVENANTS NOT TO SUE BY PLAINTIFF

84. In consideration of the actions that will be performed and the payments that will be made by the Performing Settling Defendants under the terms of the Consent Decree and the State Decree and except as specifically provided in Paragraphs 85, 86 and 88 of this Section, the United States covenants not to sue or to take administrative action against Performing Settling Defendants, or their subsidiaries, officers, directors, parents, predecessors and successors insofar as the sole basis for liability for each at the Site is its asserted ownership or control of that Performing Settling Defendant, pursuant to Sections 106 and 107(a) of CERCLA, and Section 7003 of RCRA, relating to the Site. Except with respect to future liability, these covenants not to sue shall take effect upon the occurrence of both: (1) payment to the Initial Settlement Fund and the Final Settlement Fund pursuant to Paragraph 50.b and Appendix D, by the Performing Settling Defendants (including any Interest payments due under paragraph 50.b); and (2) the receipt by EPA of the payments required by Paragraphs 51 and 52.a of Section XVII

(Reimbursement of Response Costs). With respect [*132] to future liability concerning Operable Unit 1, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 46.d. of Section XIV (Certification of Completion). With respect to claims for Natural Resource Damages, these covenants not to sue shall take effect upon payment to the State of Michigan of Natural Resource Damage settlements pursuant to Paragraph 20 of the State Decree. With respect to Operable Unit 2, these covenants not to sue shall take effect upon the occurrence of both: (1) payment to the Initial Settlement Fund and the Final Settlement Fund pursuant to Paragraph 50.b and Appendix D, by the Performing Settling Defendants (including any Interest payments due under paragraph 50.b); and (2) the receipt by EPA of the payments required by Paragraphs 51 and 52.a of Section XVII (Reimbursement of Response Costs). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

85. United States' Pre-certification reservations. [*133] Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Performing Settling Defendants to perform further response actions relating to the Site, or to reimburse the United States for additional costs of its response actions if, prior to certification of completion of the Remedial Action:

- (i) conditions at the Site, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment. In the event the United States institutes proceedings pursuant to this Paragraph of this Consent Decree, the Performing Settling Defendants reserve all their rights and defenses available under CERCLA.

86. United States' Post-certification reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent [*134] Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Performing Settling Defendants to perform further response actions relating to the Site, or to reimburse the United States for additional costs of its response actions if, after certification of completion of the Remedial Action:

- (i) conditions at the Site, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment. In the event the United States institutes proceedings pursuant to Paragraph of this Consent Decree, the Performing Settling Defendants reserve all their rights and defenses available under CERCLA.

87. For purposes of Paragraph 85, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the second amendment to the Record of Decision was signed and set forth in the ROD and amendments for the [*135] Site and the administrative record supporting the OU1 ROD. For purposes of Paragraph 86, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action and set forth in the OU1 ROD, the administrative record supporting the OU1 ROD, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

88. General reservations of rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraph 84. The United States reserves, and this Consent Decree is without prejudice to, all rights against Performing Settling Defendants with respect to all other matters, including but not

limited to, the following:

- (1) claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;
- (2) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;
- (3) liability for future disposal of Waste Material [*136] at the Site, other than as provided in the OUI ROD, the Work, or otherwise ordered by EPA;
- (4) criminal liability;
- (5) liability for violations of federal or state law which occur during or after implementation of the Remedial Action;
- (6) liability for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 13 (Modification of the SOW or Related Work Plans), and
- (7) liability for damage to Natural Resources occurring after the date of entry of this Consent Decree.

89. a. Work Takeover. In the event EPA determines that Performing Settling Defendants have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Performing Settling Defendants may invoke the procedures set forth in Section XXIII (Dispute Resolution), Paragraph 71, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph [*137] 89. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Performing Settling Defendants shall pay pursuant to Section XVII (Reimbursement of Response Costs).

b. Groundwater Extraction System and Treatment Plant. If EPA determines that either the groundwater extraction system owned by the United States and the State or the groundwater treatment plant owned by the United States and the State has capacity in excess of that needed to ensure Performing Settling Defendants' compliance with their obligations under this Consent Decree, and that such excess capacity may be utilized for some other purpose(s) not inconsistent with this Consent Decree and with the protection of human health and the environment, EPA reserves its right to use the excess capacity or to assign it to a third party. Prior to commencing any such use or making such assignment, EPA shall consult with the Performing Settling Defendants regarding the nature of the proposed use or the terms of the proposed assignment. Any determination of the existence of excess capacity or decision by EPA to proceed with the proposed use or assignment, however, [*138] and any dispute arising after the use commences or an assignment takes place, shall be subject to challenge by the Performing Settling Defendants solely through the dispute resolution provisions of Paragraph 71 of this Consent Decree and solely on the ground that the proposed use or assignment would be incompatible, or is interfering, with their performance of their obligations under this Consent Decree. The parties intend that, to the fullest extent permitted by applicable federal law: (i) any monetary consideration EPA receives from a third party pursuant to an assignment agreement, if received before the OUI Special Account is finally disbursed pursuant to Paragraph 57.f of this Consent Decree, shall be placed in the OUI Special Account; and (ii) any monetary consideration EPA receives from a third party pursuant to an assignment agreement, if received after the OUI Special Account is finally disbursed pursuant to Paragraph 57.f of this Consent Decree, shall be placed in the general EPA Hazardous Substances Superfund to reimburse a portion of the United States' response costs. Nothing in this Paragraph shall in any way restrict or affect the State's ability to utilize any monetary [*139] consideration the State receives, either directly or indirectly, from a third party pursuant to an assignment agreement in any manner the State sees fit.

Special Provisions Related to Akzo Nobel

90. In consideration of the payments that will be made under the terms of this Decree, the United States covenants not to sue or to take administrative action against Akzo Nobel pursuant to Sections 106 and 107(a) of CERCLA, Section 7003 of RCRA, and Sections 301, 309, 311(e), (f)(2) and (h) of the Clean Water Act, it being the parties' intent, subject to the reservations of Paragraph 91, to finally resolve any claim the United States has or may have in the future against Akzo Nobel for all past response costs and response actions undertaken to date at the Site by the United States or the State or by any other person, all work to be undertaken to implement any interim or final remedy for the Site by the United States or the State or any other person, all response costs, including but not limited to oversight costs, incurred or to be incurred by the United States, the State or any other person in connection with the Site, and all claims for natural resource damages (without regard to whether [*140] they occur before or after the entry of this Consent Decree) or costs incurred in connection with assessing natural resource damages (without regard to whether they occur before or after the entry of this Consent Decree) at or in connection with the Site. Pursuant to this Consent Decree, CERCLA, and the authority of the Attorney General to compromise and settle claims of the United States, these covenants shall not be subject to the reservations of Paragraph 85 (Pre-certification Reservations), Paragraph 86 (Post-certification Reservations), and Paragraph 88 (General Reservation). These covenants not to sue shall take effect upon the occurrence of both: (1) payment to the Initial Settlement Fund and the Final Settlement Fund pursuant to Paragraph 50.b and Appendix D, by Akzo Nobel (including any Interest payments due under paragraph 50.b); and (2) the receipt by EPA of the payments required by Paragraphs 51 and 52.a of Section XVII (Reimbursement of Response Costs).

91. The United States reserves, and this Consent Decree is without prejudice to, all rights against Akzo Nobel with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure [*141] by Akzo Nobel to make any payment in accordance with Paragraph 50.b of this Consent Decree;

(b) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials by Akzo Nobel at any location that is both outside of the Site and outside the areas where hazardous substances from the Site have or may come to be located as a result of migration of existing waste materials from the Site;

(c) liability for future disposal of Waste Material at the Site by Akzo Nobel, other than as provided in the OUI ROD, the Work, as otherwise ordered by EPA, or as may result from the migration of existing Waste Materials at the Site; and

(d) criminal liability.

Special Provisions for De Minimis Settlers

92. a. Covenants not to Sue. Except for those claims reserved in Subparagraphs 92.b and 92.d below, the United States covenants not to sue or to take any other civil or administrative action against De Minimis Settling Defendants, or their subsidiaries officers, directors, parents, predecessors, and successors insofar as the sole basis for liability for each at the Site is its asserted ownership or control of that De Minimis Settling Defendant, pursuant [*142] to Sections 106 or 107 of CERCLA or Section 7003 of RCRA relating to the Site. These covenants not to sue shall take effect with respect to any individual De Minimis Settling Defendant upon the occurrence of both: (1) payment to the Initial Settlement Fund and the Final Settlement Fund pursuant to Paragraph 50.b and Appendix D, by that De Minimis Settling Defendant or in respect of its payment obligation (including any Interest payments due under paragraph 50.b); and (2) the receipt by EPA of the payments required by Paragraphs 51 and 52.a of Section XVII (Reimbursement of Response Costs).

b. Reservation of Rights. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, all rights against each De Minimis Settling Defendant with respect to:

(i) failure by a De Minimis Settling Defendant to make timely payments as required in Paragraph 50.b of this Consent Decree;

(ii) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials by a De Minimis Settling Defendant at any location that is both outside of the Site and outside the areas where hazardous substances [*143] from the Site have or may come to be located as a result of migration of existing waste materials from the Site;

(iii) liability for future disposal of waste Material at the Site by a De Minimis Settling Defendant, other than as provided in the OUI ROD, the Work or as otherwise ordered by EPA, or as may result from the migration of existing Waste Materials at the Site;

(iv) criminal liability; and

(v) liability for costs of performance of Site response actions other than those performed to date or to be performed pursuant to this Consent Decree or the State Consent Decree.

c. Certification. Each De Minimis Settling Defendant shall certify that, based on information currently available to it and to the best of its knowledge and belief: (1) it has made reasonable inquiries to gather all information which relates to its ownership, operation, generation, arrangement, treatment, transportation, storage or disposal of hazardous substances at or in connection with the Site, and has provided, directly or indirectly, all such information to the United States; and (2) it is aware of no facts indicating that its contribution was more than 1% or that the toxic or other hazardous effects of [*144] its contribution to the Site was not minimal in comparison to other hazardous substances at the Site.

d. Covenants Null and Void. If it is ever shown that a De Minimis Settling Defendant made a false certification under Paragraph 92.c., above, the covenant not to sue in paragraph 92.a shall be null and void as to that De Minimis Settling Defendant, and the violator may be subject to proceedings under 42 U.S.C. Title 18.

If it is ever shown that the volume contributed by any De Minimis Settling Defendant exceeds 2%, or that such party has contributed hazardous substances that have a disproportionately greater toxic or hazardous effect in comparison to other hazardous substances at the Site, such that the De Minimis Settling Defendant no longer qualifies for a de minimis settlement, any such De Minimis Settling Defendant shall be subject to all the requirements and obligations of Performing Settling Defendants set forth in this Consent Decree, but shall receive credit for payments already made pursuant to this Consent Decree.

e. No other obligation. Notwithstanding any other provision of this Consent Decree, De Minimis Settling Defendants shall have no obligation or liability under [*145] this Consent Decree except as set forth or reserved in this Section and Sections XVI, XVII, XXVI and XXVII.

93. Except as otherwise provided herein, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

XXVI. COVENANTS BY SETTLING DEFENDANTS

94. Covenant Not to Sue United States. Subject to the reservations in Paragraph 96, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to the Work, past response actions, and Past and Future Response Costs as defined herein or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law except as provided in Sections XVIII (Transfer and Use of Special Account Funds) and XX (Claims Against the Superfund),

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related [*146] to the Site,

c. any claims arising out of response activities at the Site, including claims based on EPA's selection of response actions, oversight of response activities or approval of plans for such activities, or

d. Any direct or indirect claim for reimbursement from any Special Account except as provided in Sections XVIII (Transfer and Use of Special Account Funds) and XX (Claims Against the Superfund).

95. Covenants Between Settling - Defendants.

a. Upon the effective date of this Consent Decree each Settling Defendant hereby releases, waives and covenants not to sue Akzo Nobel for each and every claim or cause of action of any kind, whether known or unknown, contingent or real, including without limitation under CERCLA, other federal law, Michigan law or any common law theory or cause of action, that each ever had, now has or may in the future have arising out of or related to response to environmental conditions at the Site and/or in the environment related to the Site and/or the presence or alleged presence of hazardous substances, solid or hazardous waste, petroleum, and/or any other contaminant at the Site and/or in the environment related to the Site, including without [*147] limitation each and every claim or cause of action for costs of past, present or future investigation, cleanup, control, oversight, operation and maintenance, natural resource damages (without regard to whether they occurred before or after entry of this Consent Decree) and any other response or remedial costs whether required or addressed under this Consent Decree or the State Consent Decree or for any other reason or at any other time, including, but not limited to, the discovery of new or additional information or the determination that the Work under this Consent Decree, or the IRAP or Final Remedial Measures, is not protective of human health and/or the environment for whatever reason. Each Settling Defendant agrees that its release, waiver and covenant not to sue is intended to and does bar each and every such claim and cause of action. Further, except as to claims or causes of action relating to costs incurred by Settling Defendants under this Consent Decree or the State Consent Decree, each Settling Defendant agrees to reduce any final judgment it in the future may obtain against any person and/or entity other than the other Settling Defendants determined to be jointly and [*148] severally liable to such Settling Defendant with Akzo Nobel related to the Site to the extent, if any, of Akzo Nobel's equitable share of any such final judgment to extinguish Akzo Nobel's potential liability to such other party.

b. Upon the effective date of this Consent Decree Akzo Nobel hereby releases, waives and covenants not to sue each other Settling Defendant for each and every claim or cause of action of any kind, whether known or unknown, contingent or real, including without limitation under CERCLA, Michigan law or any common law theory or cause of action, that Akzo Nobel ever had, now has or may in the future have arising out of or related to conditions at the Site and/or in the environment related to the Site and/or the presence or alleged presence of hazardous substances, solid or hazardous waste, petroleum, and/or any other contaminant at the Facility and/or in the environment related to the Facility, including without limitation each and every claim or cause of action for costs of past, present or future investigation, cleanup, control, oversight, operation and maintenance, natural resource damages (without regard to whether they occurred before or after entry of this [*149] Consent Decree) and any other response or remedial costs whether required or addressed under this Consent Decree or for any other reason or at any other time, including, but not limited to, the discovery of new or additional information or the determination that the Work under the State Consent Decree, or the IRAP or Final Remedial Measures, is not protective of human health and/or the environment for whatever reason. Akzo Nobel agrees that its release, waiver and covenant not to sue is intended to and does bar each and every such claim and cause of action. Further, except as to claims or causes of action relating to costs incurred by Akzo Nobel under this Consent Decree or the Federal Consent Decree, Akzo Nobel agrees to reduce any final judgment it in the future may obtain against any other person and/or entity determined to be jointly and severally liable to Akzo Nobel with each Settling Defendant related to the Site to the extent, if any, of each Settling Defendant's equitable share of any such final judgment to extinguish each Settling Defendant's potential liability to such other party.

c. Except as provided in this Subparagraph, Performing Settling Defendants and De Minimis [*150] Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against each other with respect to the Site or this Consent Decree, including, but not limited to, any direct or indirect claim for reimbursement or indemnification through CERCLA Sections 107, 113 or any other provision of law, or any claims arising out of response activities at the Site. The Performing Settling Defendants reserve all rights against the De

Minimis Settling Defendants for costs of Site response actions other than those performed pursuant to this Agreement or the State Consent Decree. The Settling Defendants also reserve, and this Consent Decree is without prejudice to, any claims or actions arising from a claim or action relating to the Site brought against one or more Settling Defendants by any person not a signatory to this Consent Decree, as well as any claims, actions or defenses against parties who have failed to comply with their obligations under this Consent Decree.

96. Reservations of Settling Defendants.

a. The Settling Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of [*151] Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee or agent of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671 or an agent of the United States at the Site; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

b. In the event EPA elects to use or assign the use of a portion of the groundwater extraction system's or the groundwater [*152] treatment plant's present or future extraction and/or treatment capacity not utilized or required by the Performing Settling Defendants to ensure treatment of contaminated groundwater under this Consent Decree, the Performing Settling Defendants reserve whatever right they may have to oppose such use or assignment.

c. Lomac reserves, and this Consent Decree is without prejudice to, all of its rights in the 1987 Lomac Agreements.

XXVII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

97. Except as expressly provided herein, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Except as expressly provided herein, each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

98. [*153] The Parties agree, and by entering this Consent Decree this Court finds, that each Performing Settling Defendant and each De Minimis Settling Defendant, including the subsidiaries, officers, directors, parents, predecessors, and successors of each Performing Settling Defendant and each De Minimis Settling Defendant insofar as the sole basis for liability for each at the Site is its asserted ownership or control of such Performing Settling Defendant or De Minimis Settling Defendant, and Akzo Nobel, are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Consent Decree. "Matters Addressed" as to Performing Settling Defendants shall include all past response costs and response actions undertaken to date at the Site by the Plaintiff or by any other person, all work to be undertaken to implement any interim or final remedy for the Site by the State or Lomac, all work to be undertaken pursuant to the OU1 ROD and this Consent Decree, and oversight costs incurred or to be incurred by the Plaintiff or any other person in connection with the [*154] Site, and all claims for Natural Resource Damages or costs incurred in connection with assessing Natural Resource Damages at or in connection with the Site. "Matters Addressed" as to De Minimis Settling Defendants means all response actions taken to date at the Site and all response actions to be taken pursuant to this Consent Decree, plus all response costs incurred to date and all response costs to be incurred pursuant to this Consent Decree, by the United States or any other person with respect to the Site, and all claims for Natural Resource Damages or costs incurred in connection

with assessing Natural Resource Damages at or in connection with the Site. "Matters Addressed" as to Akzo Nobel means all past response costs and response actions undertaken to date at the Site by the United States or the State or any other person, all response costs, including but not limited to oversight costs incurred or to be incurred by the United States or the State or any other person in connection with the Site, and all claims for damages to Natural Resources (without regard to whether they occur before or after the entry of this Consent Decree) or costs incurred in connection with assessing damages [*155] to Natural Resources (without regard to whether they occur before or after the entry of this Consent Decree) at or in connection with the Site. The "matters addressed" in this settlement with respect to each Settling Defendant do not include those response costs, response actions, or damages as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Consent Decree) as to such Settling Defendant, in the event that the United States asserts rights against the Settling Defendant coming within the scope of those reservations.

99. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States and the State in writing no later than 30 days prior to the initiation of such suit or claim.

100. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States and the State within 30 days of service of the complaint on them.

101. In any subsequent administrative or judicial [*156] proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXV (Covenants Not to Sue by Plaintiff).

XXVIII. ACCESS TO INFORMATION

102. Performing Settling Defendants shall provide to EPA and the State, upon request, copies of all non-privileged documents and information within their possession or control or that of their contractors or agents relating to response activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or [*157] information related to the Work. Settling Defendants shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

103. a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

b. The Settling Defendants may assert that certain documents, records and other information are privileged [*158] under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements

of the Consent Decree shall be withheld on the grounds that they are privileged.

104. No claim of confidentiality shall be made with respect to any data gathered pursuant to the terms of this Consent Decree, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XXIX. RETENTION OF RECORDS

105. Unless compliance with this requirement is waived [*159] by the United States earlier, the Performing Settling Defendants shall preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary, until 10 years after the Performing Settling Defendants' receipt of EPA's notification pursuant to Paragraph 46 of Section XIV (Certification of Completion of the Remedial Action). Until 10 years after the Performing Settling Defendants' receipt of EPA's notification pursuant to Paragraph 46 of Section XIV (Certification of Completion of the Remedial Action), Performing Settling Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

106. At the conclusion of this document retention period, Performing Settling Defendants shall notify the United States and the State at least 90 days prior to the destruction of any such records or documents, and, [*160] upon request by the United States or the State, Performing Settling Defendants shall deliver any such records or documents to EPA or the State. The Performing Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Performing Settling Defendants assert such a privilege, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Performing Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

107. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed [*161] or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

XXX. NOTICES AND SUBMISSIONS

108. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the State, and the Settling Defendants, respectively.

As to the United States:

Chief, Environmental [*162] Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Re: DJ # 90-11-3-191A

and

Director, Superfund Division
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604-3590

John Fagiolo
EPA Project Coordinator
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604-3590

As to the State:

Dennis Eagle
State Project Coordinator
Michigan Department of Environmental Quality
P.O. Box 30426
Lansing, Michigan 48909

As to the Settling Defendants:

Jerome I. Maynard
Dykema Gossett
55 East Monroe Street
Suite 3015
Chicago, Illinois 60603-5709

XXXI. EFFECTIVE DATE

109. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXXII. RETENTION OF JURISDICTION

110. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the [*163] Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XXIII (Dispute Resolution) hereof.

XXXIII. APPENDICES

111. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is the ROD and ROD Amendments.

"Appendix B" is the EPA's concurrence on the IRAP.

"Appendix C" is the State Agreement and IRAP.

"Appendix D" is the complete list of the Settling Defendants and the payments to be made by those parties.

"Appendix E" is the map generally describing the Site.

"Appendix F" is the Preauthorization Decision Document.

"Appendix G" is the SOW.

"Appendix H" is a form of trust Agreement to be used by the Settling Defendants.

"Appendix I" is the Confidentiality Agreement for disclosure of contractor progress reports to the Performing Settling Defendants.

XXXIV. COMMUNITY RELATIONS

112. Performing Settling Defendants shall propose to EPA and the State their participation in the community relations plan to be developed [*164] by EPA. EPA will determine the appropriate role for the Performing Settling Defendants under the Plan. Performing Settling Defendants shall also cooperate with EPA and the State in providing information regarding the Site to the public. As requested by EPA, Performing Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

XXXV. MODIFICATION

113. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Performing Settling Defendants. All such modifications shall be made in writing.

114. Except as provided in Paragraph 13 ("Modification of the SOW or related Work Plans"), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Performing Settling Defendants, and the Court. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially [*165] alter that document may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Performing Settling Defendants.

115. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

116. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

117. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation [*166] between the Parties. Provided however, that the Parties' agreement as to the limited waiver of the jurisdictional defense of Akzo Nobel is a precondition to Akzo Nobel's agreement to the lodging of the Consent Decree with the Court and is not voidable and shall survive as a fully enforceable agreement among the Parties, whether or not this Consent Decree is approved and entered by the Court.

XXXVII. SIGNATORIES/SERVICE

118. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

119. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

120. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is [*167] authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XXXVIII. FINAL JUDGMENT

121. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54.

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Akzo Nobel, et al., relating to the Bofors Nobel, Inc. Superfund Site.

Date: September 24, 1998

Charles E. Golden

Executive Vice President/Chief Financial Officer

Lilly Corporate Center
Indianapolis, Indiana 4628

Date: September 22, 1998

By: Solutia Inc.

Attorney-in-Fact

By: Michael A. Pierle

Vice President, Environmental,

Safety & Health [*168]

Date: 9/22/98

Ferdinando Beccalli

Vice President and General Manager

GE Plastics - Americas

One Plastics Avenue

Pittsfield, MA 01201

Date: 9/22/98

Name: John A. Tomke

Title: Vice President

Address: 9330 Zionsville Road

Indianapolis, IN 46268

Date: 09/25/98

Marvin r. Gallisdorfer

President

Lomac, Inc.

266 W. Mitchell Avenue

Cincinnati, Ohio 45232

(513)681-0099

Date: September 24, 1999

Ron J. Cottle

Vice President

Union Carbide Corporation

39 Old Ridgebury Road

Danbury, Connecticut 06817

Date: September 22, 1998

Kathleen A. Shelton

Midwest Remediation Manager

DuPont Corporate Remediation Group

BMP-27/Room 2354

P. O. Box 80027

Wilmington, DE 19880-0027

Date: September 23, 1998

Daniel T. Caldon, Senior Vice President-Administration

BISSELL Inc.

PO Box 1888

Grand Rapids, MI 49501

Date: September 22, 1998

David J. Cartenuto

Associate General Counsel

P. O. Box 100, Rte. 100, MD2428

Somers, NY 10589

Date: September 23, 1998

S.A. Tasher

Vice President

Five Giralda Farms

Madison, New Jersey 07094

Date: September 22, 1998

Name: Donald F. Parman

Title: Secretary

Address: SmithKline Beecham Corporation

One Franklin Plaza

P. O. Box 7929

Philadelphia, PA

(215) 751-7059

Date: September 22, 1998

Name: [*169] G. A. Thompson

Title: Remediation Manager

Address: P.O. Box 2463

Houston, TX 77252-2463

Date: /September 25, 1998

Roger A. Keller

Vice President, Secretary & General Coun

675 Mc Donnell Blvd.

PO Box 5840

St. Louis, Missouri 63134

Date: September 21, 1998

Sven Buhre

Financial Dir.

P.O. Box 11500

S-100 61 Stockholm, Sweden

Marie [ILLEGIBLE WORD]

Legal Counsel

ATTACHMENT:

SWEDEN

Registration number: 556000-1629

Date of registration: 1897-02-01

Company name: Akzo Nobel Aktiebolag

Address: Box 11500

100 61 STOCKHOLM

Registered office: Stockholm

Share capital: SEK 1.013.762.275

BOARD OF DIRECTORS:

450328-0812 Buhre, Nils Sven Olof, Skogsklockevagen 44,

181 57 LIDINGO

301011-6832 Ekberg, John Villy Clarence, Verdandivagen 1 G,

131 46 NACKA

430127-0510 Kjellin, Ole, Badstrandsvagen 14, 141 39 HUDDINGE

491128-5569 Martinsson, Barbro Elisabeth, (A), Sorgardsvagen 6,

445 37 BOHUS

440531-5559 Martinsson, Kurt Ragnar, (A), Sodra Angsvagen 3,

440 41 NOL

400621-1033 Mattsson, Ove Henning, (E), Avenue des Chasseurs 12 B,

B-1410 WATERLOO, BELGIEN

640827-4352 Svensson, Lars Robert, (A), Celsiusgatan 2 B,

212 14 MALMO

440216-5254 Werner, Erik Olof Rickard, (E), Parklaan 4,

1217EB HILVERSUM, NEDERLANDERNA

370125 [*170] den Hoed, Jean, (E), Oranjelaan 11, NL-3851RK ERMELO,

NEDERLANDERNA

DEPUTY MEMBERS OF THE BOARD:

470922-6312 Karlsson, Bengt Erik, (A), Alvagen 37, 663 02 HAMMARO

650218-4861 Palm, Kerstin Anna-Lena, (A), Stavhopparegatan 5 A,

416 59 GOTEBORG

361108-8976 Wormbs, Hans Lennart, (A), Vinbarsvagen 4,

862 34 KVISSLEBY

MANAGING DIRECTOR:

430127-0510 Kjellin, Ole, Badstrandsvagen 14, 141 39 HUDDINGE

DEPUTY MANAGING DIRECTOR:

450328-0812 Buhre, Nils Sven Olof, Skogsklockevagen 44,

181 57 LIDINGO

OTHER PERSONS AUTHORIZED TO SIGN ON BEHALF OF THE COMPANY:

380128-3353 Frantzen, Karl Ake, Ynglingavagen 13-15,

182 62 DJURSHOLM

381103-7716 Johansson, Rolf Gustav, Lodjurets gata 317,

136 64 HANINGE

481231-4385 Naslund Blomqvist, Viveka Marie, Sodermannagatan 9,

116 23 STOCKHOLM

COMPANY AUDITORS:

460226-0558 Bergman, Per Gustaf, c/o KPMG Bohlins AB, Box 16106,

103 23 STOCKHOLM

SIGNATORY POWER:

In addition to the Board of Directors,

any two jointly of

Buhre, Nils Sven Olof

Kjellin, Ole

Mattsson, Ove Henning

Werner, Erik Olof Rickard

Frantzen, Karl Ake

Johansson, Rolf Gustav

Naslund Blomqvist, Viveka Marie

or any one of

Buhre, Nils Sven Olof

Ekberg, John Villy Clarence

Mattsson, Ove Henning

Werner, [*171] Erik Olof Rickard

den Hoed, Jean

in combination with

Kjellin, Ole

are entitled to sign on behalf of the company.

Pursuant to Chapter 8, section 12, of the Companies Act, the Managing Director, in his normal business activities, is also entitled to sign on behalf of the company.

FINANCIAL YEAR:

Registered financial year: 0101-1231

Latest annual report submitted covers financial

period 960101-961231

DATE OF REGISTRATION OF CURRENT AND PREVIOUS COMPANY NAMES:

1994-08-04 Akzo Nobel Aktiebolag

1991-05-24 Nobel Industrier Aktiebolag

1985-03-28 Nobel Industrier Sverige Aktiebolag

1919-08-13 Aktiebolaget Bofors

1897-02-01 Aktiebolaget Bofors-Gullspang

SUNDSVALL 1998-06-29

Ex officio

ELISABETH KARLSSON

(A) = employee representative

(U) = person resident outside EEA

(E) = person resident outside Sweden but within EEA